TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

October Term, 1915.

No. 610

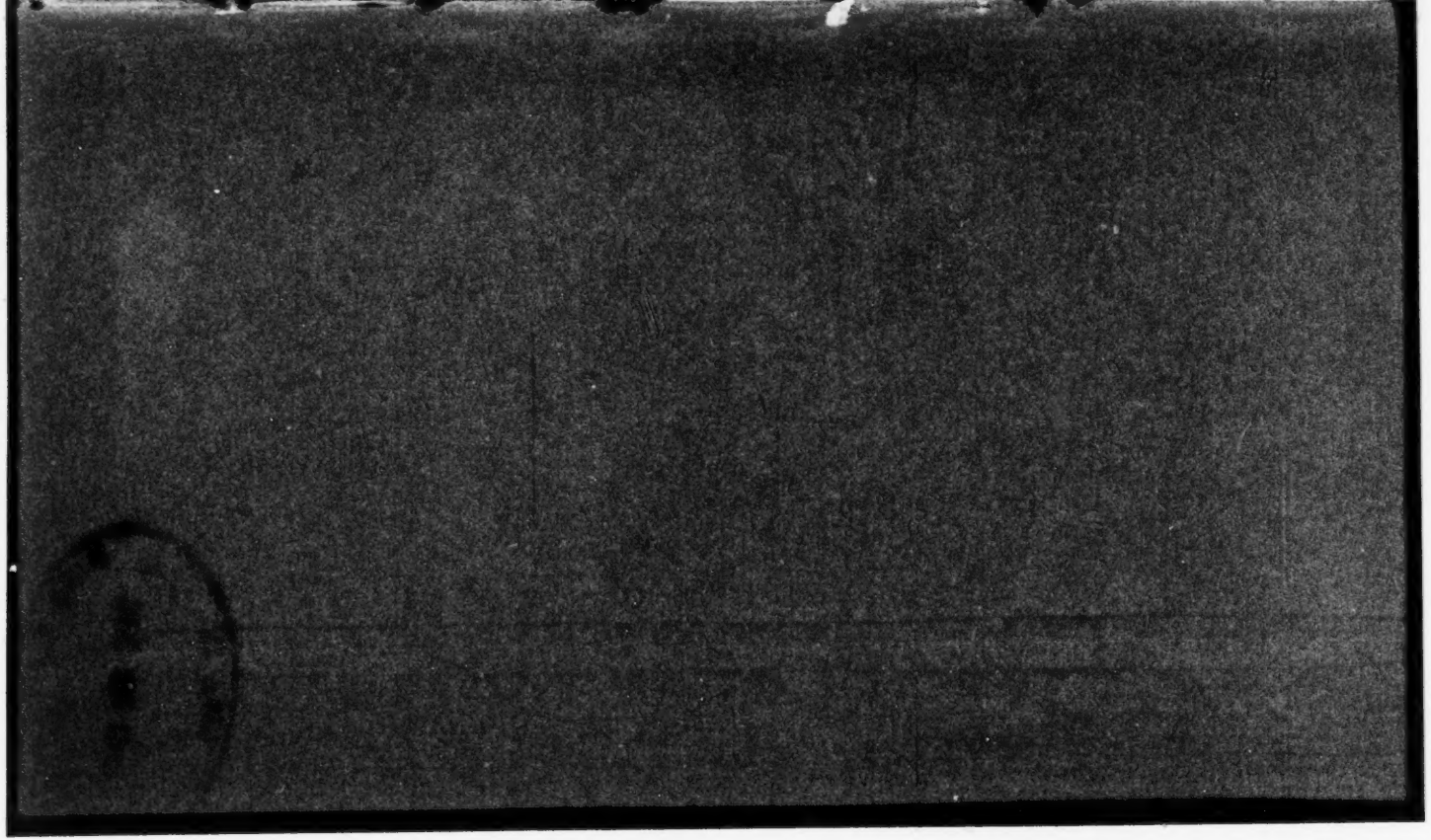
THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRANK H. MASON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED APRIL 14, 1916.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 888.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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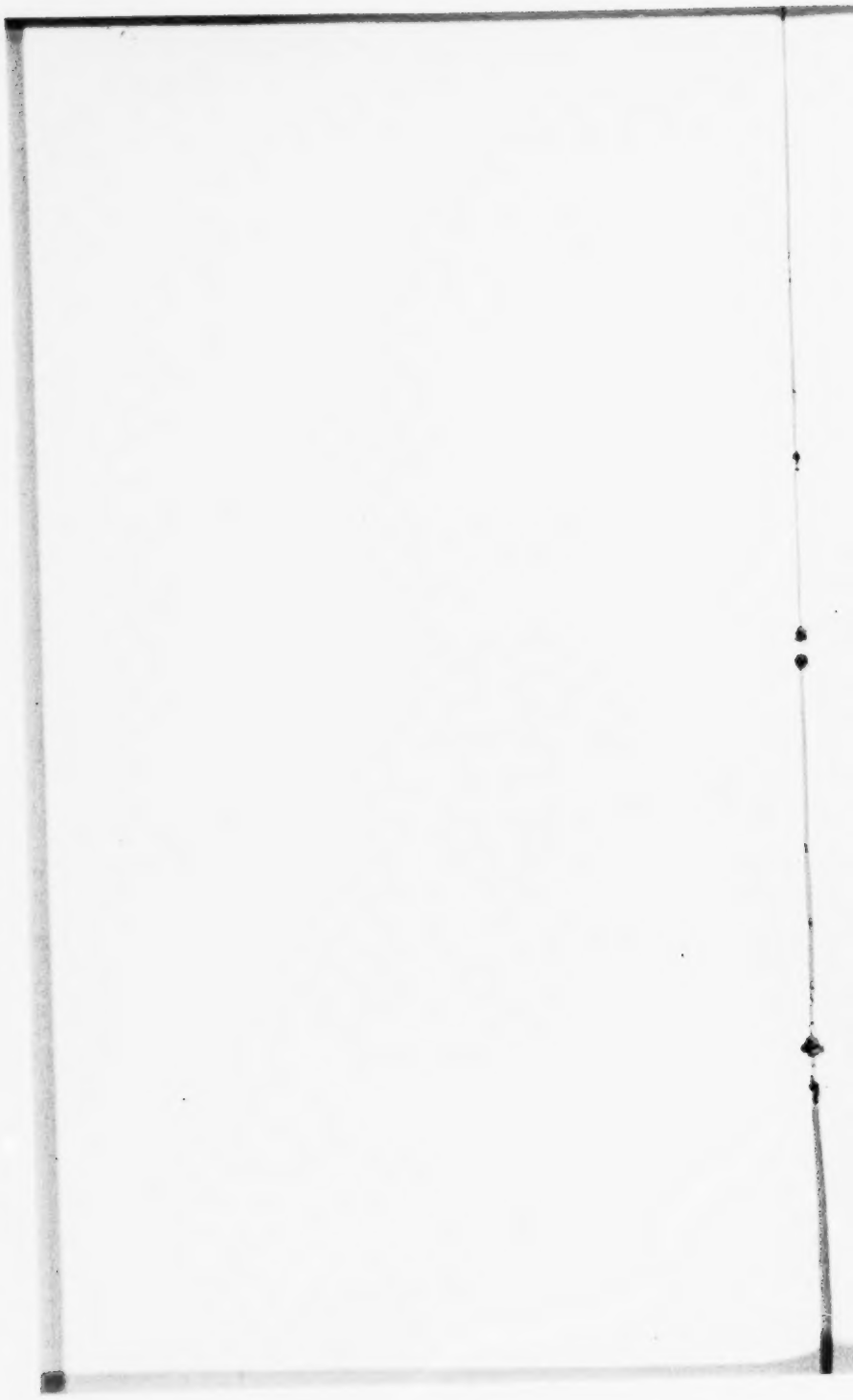

1 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judge of the Circuit Court of the United States for the District of Massachusetts greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, in a cause entitled United States, by indictment, against Frank H. Mason, defendant, a manifest error hath happened, to the great damage of the said United States, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, D. C., on the* eighteenth day of April next, in the said Supreme Court at Washington, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the seventh day of April, in the year of our Lord one thousand nine hundred and ten.

CHARLES K. DARLING,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by
W. L. PUTNAM,
U. S. Circuit Judge.
April 7, 1910.

2 *Return of Circuit Court on writ of error.*

CIRCUIT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the judge of the Circuit Court of the United States, in and for the District of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said Circuit Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

* Not exceeding 30 days from the day of signing the citation. Rule 14, sec. 5.

In testimony whereof, I, Charles K. Darling, clerk of said Circuit Court of the United States in and for the District of Massachusetts, have hereto set my hand and the seal of said court this 13th day of April, A. D. 1910.

[SEAL.] CHARLES K. DARLING, *Clerk.*

3 *Transcript of record of Circuit Court.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on Wednesday, the twenty-third day of February, the last Tuesday of February being a legal holiday, in the year of our Lord one thousand nine hundred and ten.

Before the Honorable Francis C. Lowell, Circuit Judge.

UNITED STATES, BY INDICTMENT, v. FRANK H. MASON.	No. 45, Criminal Docket.

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4 This indictment was returned in the District Court of the United States for the District of Massachusetts, and was remitted to this Circuit Court upon the motion of the United States, by its attorney, Asa P. French, filed and allowed in said District Court, and was here entered at the October term, A. D. 1909.

Upon the entry of said cause in this Circuit Court, the record of the District Court was remitted and is in the words and figures following:

5 *Record of the District Court.*

(Remitted to Circuit Court from District Court, January 1, 1910.)

INDICTMENT.

The United States of America.

At a District Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said district, on the first Tuesday of December in the year of our Lord one thousand nine hundred and nine.

First count. The jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that Frank H. Mason, of Boston, in said district, during all of the year nineteen hundred and eight was, and ever since then has been,

an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and, on the first day of February, in the year nineteen hundred and nine,
6 had in his possession and under his control, to wit, at Boston aforesaid, certain money of the United States, a particular description whereof is to said grand jurors unknown, to the amount and value of three hundred and eighty-seven dollars, which during said year nineteen hundred and eight had come into his possession and under his control in the execution of his office as such officer anl clerk, and under authority and claim of authority as such officer and clerk, and which he should, on said first day of February, in the year nineteen hundred and nine, have accouted for and paid to the United States at Boston aforesaid in the manner provided by law; and that said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, at Boston aforesaid, the same money unlawfully and feloniously did embezzle.

Second count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason during all of the year nineteen hundred and eight was, and ever since has been, an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and on said first day of February, in the year nineteen hundred and nine, had in his possession and under his control, to wit, at Boston aforesaid, certain public moneys of the United States, a particular description whereof is to said grand jurors unknown, to wit, moneys to the amount and of the value of three hundred and eighty-seven dollars, which during said year nineteen hundred and eight had come into his possession and under his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and were a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year nineteen hundred and eight, which said public moneys said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, as such officer, was charged, by certain acts of Congress, to wit, sections 823, 828, and 844 of the Revised Statutes of the United States, and the act approved June 28, 1902, 32 Statutes at Large, chapter 1301, and by divers other acts of Congress, safely to keep; that said Frank H. Mason, on said first day of
7 February, in the year nineteen hundred and nine, at Boston aforesaid, the same public moneys unlawfully did fail safely to keep as required by said acts of Congress, and, on the contrary, the same then and there unlawfully did convert to his own use; and that thereby said Frank H. Mason then and there was guilty of embezzlement of said public moneys so converted.

Third count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason during all of the year nineteen hundred and eight was, and ever since has been, an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and on said first day of

February, in the year nineteen hundred and nine, had in his possession and under his control, to wit, at Boston aforesaid, certain public moneys of the United States, a particular description whereof is to said grand jurors unknown, to wit, moneys to the amount and of the value of three hundred and eighty-seven dollars, which during said year nineteen hundred and eight had come into his possession and under his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and were a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year nineteen hundred and eight, which said public moneys said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, as such officer, was charged, by certain acts of Congress, to wit, sections 823, 828 and 844 of the Revised Statutes of the United States, and the act approved June 28, 1902, 32 Statutes at Large, chapter 1301, and by divers other acts of Congress, safely to keep; that said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, at Boston aforesaid, the last-mentioned public moneys unlawfully did fail safely to keep as required by said acts of Congress, and, on the contrary, the same then and there unlawfully and fraudulently did convert to his own use; and that thereby said Frank H. Mason then and there was guilty of embezzlement of said public moneys so converted.

Fourth count. And the jurors aforesaid, on their oath
8 aforesaid, do further present, that said Frank H. Mason, during all of the year nineteen hundred and eight was, and ever since then has been, an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and, on said first day of February, in the year nineteen hundred and nine, had in his possession and under his control, to wit, at Boston aforesaid, a portion of the money of the United States, a particular description whereof is to said grand jurors unknown, to wit, money to the amount and of the value of three hundred and eighty-seven dollars, which during said year nineteen hundred and eight, had come into his possession and under his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and was a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year nineteen hundred and eight, which money last aforesaid he should, on said first day of February, in the year nineteen hundred and nine, have paid to the United States at Boston aforesaid in the manner provided by law; and that said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, at Boston aforesaid, the same money unlawfully, wrongfully, and fraudulently did convert to his own personal use and embezzle.

Fifth count. And the jurors aforesaid, on their oath aforesaid, do further present that Frank H. Mason, of Boston, in said district,

at said Boston, on the twenty-fifth day of May in the year nineteen hundred and nine, said Mason being then and there an officer, to wit, the clerk of the District Court of the United States for the District of Massachusetts, and a person charged, by certain acts of Congress, to wit, sections 823, 828 and 844 of the Revised Statutes of the United States, and the act approved June 28, 1902, 32 Statutes at Large, chapter 1301, and by divers other acts of Congress, with the safe keeping of the public moneys of the said United States, and then and there having such public moneys in his charge as such officer and person, did then and there fail, in the manner following,

9 safely to keep the same, that is to say, by unlawfully converting to his own use of the said public moneys the amount and value of three hundred and eighty-seven dollars. Whereby and by force of the statute in such case made and provided, the said Frank H. Mason has committed the crime of embezzlement.

Sixth count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason, of Boston, in said district, at said Boston, on the twenty-fifth day of May in the year nineteen hundred and nine, said Mason being then and there an officer, to wit, the clerk of the District Court of the United States for the District of Massachusetts, and a person charged, by certain acts of Congress, to wit, sections 823, 828, and 844 of the Revised Statutes of the United States, and the act approved June 28, 1902, 32 Statutes at Large, chapter 1301, and by divers other acts of Congress, with the safe keeping of the public moneys of the said United States, and then and there having such public moneys in his charge as such officer and person, did then and there fail, in the manner following, safely to keep the same, that is to say, by unlawfully and fraudulently converting to his own use of the said public moneys the amount and value of three hundred and eighty-seven dollars. Whereby and by force of the statute in such case made and provided, the said Frank H. Mason has committed the crime of embezzlement.

The different counts herein are different descriptions of the same acts.

A true bill.

AARON GAY,
Foreman of the Grand Jury.

ASA P. FRENCH,
United States Attorney for the District of Massachusetts.

DISTRICT OF MASSACHUSETTS, *December 10, 1909.*

Returned into the court by the grand jurors and filed.

WILLIAM NELSON,
Deputy Clerk.

10 United States District Court, Massachusetts District.

DECEMBER 31, 1909.

Aldrich, J. And now it appearing to the court that the district attorney deems it necessary, it is ordered that this indictment be

remitted to the next term and session of the Circuit Court of the United States for this district.

Attest: WILLIAM NELSON,
Deputy Clerk.

UNITED STATES OF AMERICA.

District Court, District of Massachusetts, December term, 1909.

UNITED STATES, BY INDICTMENT,
vs.
FRANK H. MASON.

Defendant's demurrer.

(Filed in District Court December 31, 1909.)

And the said Frank H. Mason in his own proper person cometh into court here and demurs to the said indictment and each and every count thereof, and says that the said indictment and the matters therein contained, and each and every count thereof and the matters therein contained, in the manner and form as the same are above stated and set forth, are not sufficient in law, and that the said Frank H. Mason is not bound by the law of the land to answer the same, and this he is ready to verify.

Wherefore for want of sufficient indictment in this behalf the said defendant prays judgment and that by the court he may be dismissed and discharged from the said premises in the said court of said indictment.

And this defendant, not waiving his right to file further grounds for demurrer if he shall so desire, but insisting upon said right and upon his right to avail himself of all grounds of objection
11 under the above general demurrer, without filing any statement of the same, further demurs to the first count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because said count does not charge the defendant with any crime against the laws of the United States.

2. Because said count does not charge with sufficient certainty or particularity any violation of any statute of the United States.

3. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant fraudulently converted to the use of any person the moneys therein referred to, and because the allegation therein contained, that "said Frank H. Mason on said first day of February in the year 1908, at Boston aforesaid, the said money unlawfully and feloniously did embezzle," is insufficient to charge such fraudulent conversion.

4. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant fraudulently embezzled the moneys therein referred to, and because the allegation therein con-

tained, that " said Frank H. Mason on said first day of February in the year 1908, at Boston aforesaid, the said money unlawfully and feloniously did embezzle," is insufficient to charge such embezzlement.

5. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant had not duly accounted to the United States for the moneys therein referred to.

6. Because the material allegation in said count that the moneys therein referred to came into the possession of or under the control of the defendant as clerk of the District Court of the United States is repugnant to and inconsistent with the material allegation in said count that said moneys were of the United States.

7. Because said count does not charge with sufficient certainty, or with any certainty, for or on what account, or for or on account of what services, emoluments, fees, or other consideration, the moneys therein referred to came into the possession and under the control of the defendant.

8. Because said count does not set forth with the certainty required by law any acts of the defendant constituting an embezzle-
12 ment of the moneys therein referred to within the intent of any statute of the United States, and because the allegations of said count are too indefinite and general to charge the defendant with the crime of embezzlement plainly, substantially, and with the certainty by law required.

9. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was not entitled to retain the moneys therein referred to on account of fees, salaries, or other indebtedness due to him from the United States, or for or on account of services performed by him as clerk as aforesaid.

And the defendant further demurs to the second count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because said count dose not charge any crime against the laws of the United States or any violation of any statute of the United States.

2. Because said count does not charge with sufficient certainty any crime against the laws of the United States or any violation of any statute of the United States.

3. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was an officer or other person charged by any act of Congress with the safe keeping of the public moneys.

4. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant wilfully or intentionally wrongfully failed to safely keep the moneys therein set forth without loaning, using, or converting the same to his own use.

5. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant fraudulently converted to the use of any person the moneys therein referred to.

6. Because the material allegation in said count that said moneys were public moneys of the United States is repugnant to and in-

consistent with the material allegation therein that said moneys were a portion of a surplus of fees and emoluments of said office of clerk of the District Court of the United States for the district of Massachusetts.

13 7. Because said count fails to set forth with sufficient certainty, or with any certainty, the character and nature of the fees and emoluments for and on account of which said moneys came into the possession and under the control of the defendant.

8. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant had not duly accounted to the United States for the moneys therein referred to.

9. Because said count does not set forth with the certainty required by law any acts of the defendant constituting an embezzlement of the moneys therein referred to within the intent of any statute of the United States, and because the allegations of said count are too indefinite and general to charge the defendant with the crime of embezzlement plainly, substantially, and with the certainty by law required.

10. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was not entitled to retain the moneys therein referred to on account of fees, salaries, or other indebtedness due to him from the United States, or for or on account of services performed by him as clerk as aforesaid.

And the defendant further demurs to the third count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because said count does not charge any crime against the laws of the United States or any violation of any statute of the United States.

2. Because said count does not charge with sufficient certainty any crime against the laws of the United States or any violation of any statute of the United States.

3. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was an officer or other person charged by any act of Congress with the safe keeping of the public moneys.

4. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant wilfully or intentionally wrongfully failed to safely keep the moneys therein set forth without loaning, using or converting the same to his own use.

14 5. Because the material allegation in said count that said moneys were public moneys of the United States is repugnant to and inconsistent with the material allegation therein that said moneys were a portion of a surplus of fees and emoluments of said office of clerk of the District Court of the United States for the District of Massachusetts.

6. Because said count fails to set forth with sufficient certainty, or with any certainty, the character and nature of the fees and

emoluments for and on account of which said moneys came into the possession and under the control of the defendant.

7. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant had not duly accounted to the United States for the moneys therein referred to.

8. Because said count does not set forth with the certainty required by law any acts of the defendant constituting an embezzlement of the moneys therein referred to within the intent of any statute of the United States, and because the allegations of said count are too indefinite and general to charge the defendant with the crime of embezzlement plainly, substantially, and with the certainty by law required.

9. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was not entitled to retain the moneys therein referred to on account of fees, salaries or other indebtedness due to him from the United States, or for or on account of services performed by him as clerk as aforesaid.

And the defendant further demurs to the fourth count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because said count does not charge the defendant with any crime against the laws of the United States.

2. Because said count does not charge with sufficient certainty or particularity any violation of any statute of the United States.

3. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant had not duly accounted to the United States for the moneys therein referred to.

4. Because the material allegation in said count that said moneys were public moneys of the United States is repugnant to and inconsistent with the material allegation therein that said moneys were a portion of a surplus of fees and emoluments of said office of clerk of the District Court of the United States for the District of Massachusetts.

5. Because said count fails to set forth with sufficient certainty, or with any certainty, the character and nature of the fees and emoluments for and on account of which said moneys came into the possession and under the control of the defendant.

6. Because said count does not set forth with the certainty required by law any acts of the defendant constituting an embezzlement of the moneys therein referred to within the intent of any statute of the United States, and because the allegations of said count are too indefinite and general to charge the defendant with the crime of embezzlement plainly, substantially, and with the certainty by law required.

7. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was not entitled to retain

the moneys therein referred to on account of fees, salaries, or other indebtedness due to him from the United States, or for or on account of services performed by him as clerk as aforesaid.

And the defendant further demurs to the fifth count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because said count does not charge the defendant with any crime against the laws of the United States.

2. Because said count does not charge with sufficient certainty or particularity any violation of any statute of the United States.

3. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant fraudulently converted to the use of any person the moneys therein referred to.

4. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant wilfully or intentionally wrongfully failed to safely keep the moneys therein set forth without loaning, using, or converting the same to his own use.

5. Because said count does not charge with sufficient cer-
16 tainty, or with any certainty, that the defendant had not duly accounted to the United States for the moneys therein referred to.

6. Because the material allegation in said count that the moneys therein referred to came into the possession of or under the control of the defendant as clerk of the District Court of the United States is repugnant to and inconsistent with the material allegation in said count that said moneys were of the United States.

7. Because said count does not charge with sufficient certainty, or with any certainty, for or on what account, or for on account of what services, emoluments, fees, or other consideration, the moneys therein referred to came into the possession and under the control of the defendant.

8. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was an officer or other person charged by any act of Congress with the safe keeping of the public moneys.

9. Because said count does not set forth with the certainty required by law any acts of the defendant constituting an embezzlement of the moneys therein referred to within the intent of any statute of the United States, and because the allegations of said count are too indefinite and general to charge the defendant with the crime of embezzlement plainly, substantially, and with the certainty by law required.

10. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was not entitled to retain the moneys therein referred to on account of fees, salaries, or other

indebetedness due to him from the United States, or for or on account of services performed by him as clerk as aforesaid.

And the defendant further demurs to the sixth count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because said count does not charge the defendant with any crime against the laws of the United States.

2. Because said count does not charge with sufficient certainty or particularity any violation of any statute of the United States.

3. Because said count does not charge with sufficient cer-
17 tainty, or with any certainty, that the defendant wilfully or intentially wrongfully failed to safely keep the moneys therein set forth without loaning, using, or converting the same to his own use.

4. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant had not duly accounted to the United States or the moneys therein referred to.

5. Because the material allegation in said count that the moneys therein referred to came into the possession of or under the control of the defendant as clerk of the District Court of the United States is repugnant to and inconsistent with the material allegation in said count that said moneys were of the United States.

6. Because said count does not charge with sufficient certainty, or with any certainty, for or on what account, or for or on account of what services, emoluments, fees, or other consideration, the moneys therein referred to came into the possession and under the control of the defendant.

7. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was an officer or other person charged by any act of Congress with the safe keeping of the public moneys.

8. Because said count does not set forth with the certainty required by law any acts of the defendant constituting an embezzlement of the moneys therein referred to within the intent of any statute of the United States, and because the allegations of said count are too indefinite and general to charge the defendant with the crime of embezzlement plainly, substantially, and with the certainty by law required.

9. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was not entitled to retain the moneys therein referred to on account of fees, salaries, or other indebtedness due to him from the United States, or for or on account of services performed by him as clerk as aforesaid.

FRANK H. MASON.

BOYD B. JONES,
GEORGE L. WILSON,
Attorneys for Defendant.

18 In the District Court of the United States.

DISTRICT OF MASSACHUSETTS, *ss.*

No. 303, United States (by indictment) v. Frank H. Mason.
No. 304. Same v. Same.
No. 305. Same v. Same.
No. 306. Same v. Same.

Motion to remit indictments to the Circuit Court.

(Filed in District Court December 31, 1909.)

And now comes the United States and moves that the above-entitled indictments be remitted to the next session of the Circuit Court of the United States for the District of Massachusetts, to wit, forthwith, in accordance with the provisions of section ten hundred and thirty-seven of the Revised Statutes.

UNITED STATES OF AMERICA,
by its Attorney,
ASA P. FRENCH.

I hereby certify that I deem it necessary, on the ground of propriety, that the above-entitled indictments be remitted to the Circuit Court as suggested in the foregoing motion.

ASA P. FRENCH,
United States Attorney.

December 31, 1909.
Motion granted.
ALDRICH, J., *Presiding.*

19 On the ninth day of February, A. D. 1910, this cause was set down for hearing on demurrer and heard in part by the court, the Honorable William L. Putnam, circuit judge, sitting.

This cause was thence continued to the present February term, A. D. 1910, when this cause comes on to be further heard on demurrer on the third and fourth days of March, A. D. 1910, the Honorable William L. Putnam, circuit judge, sitting as aforesaid.

On the said fourth day of March, A. D. 1910, the opinion of the court is announced, ordering counsel to submit proper interlocutory judgment on the indictment.

On the seventh day of April, A. D. 1910, the following judgment on demurrer is entered in accordance with said opinion:

Judgment on demurrer.

APRIL 7, 1910.

PUTNAM, J. This cause came on to be heard on demurrer of the defendant, at this term of court, before the Honorable William L. Putnam, circuit judge, and after the submission of briefs and supple-

mental brief for both parties, *and after the submission of briefs and supplemental brief for both parties*, and after oral argument by counsel, and after due consideration therein had, and after opinion rendered by the court and duly filed,

It is ordered, adjudged, and decreed that said demurrer be sustained as to the second, third, and fourth counts of said indictment, and that the defendant go without day as to said second, third, and fourth counts, and that said demurrer be overruled as to the first, fifth, and sixth counts of said indictment, and the defendant be allowed to answer over as to said first, fifth, and sixth counts.

By the court:

CHARLES K. DARLING, *Clerk.*

20 On the same day the following bill of exceptions of the United States is filed and allowed:

Bill of exceptions of the United States.

(Filed and allowed April 7, 1910.)

Be it remembered that on the seventh day of April, A. D. 1910, the demurrer of the defendant, Frank H. Mason, to the second, third, and fourth counts of the indictment in the above entitled cause was sustained, and the United States duly excepted to the order of the court sustaining the demurrer to the said second, third, and fourth counts of said indictment, and its exception was allowed. A copy of the opinion of the court sustaining said demurrer to said counts is hereto annexed and made a part hereof, and the United States of America, by its attorney, Asa P. French, now presents this bill of exceptions to the court, and prays that the same may be signed by the court and allowed, and made a part of the record in this cause. It is further stipulated by the United States that if these exceptions are sustained, the defendant may be permitted to answer over to said second, third, and fourth counts of this indictment.

UNITED STATES OF AMERICA,
By ASA P. FRENCH,
United States Attorney.

April 7, 1910.
Allowed:
W. L. PUTNAM, *Circuit Judge.*

21 Circuit Court of the United States, District of Massachusetts.

UNITED STATES
v.
FRANK H. MASON.
} On demurrers Nos. 45, 46, 47, and 48, Criminal Docket. Four indictments.

Opinion of the court.

MARCH 4, 1910.

PUTNAM, J., orally. I will first take up the indictments relating to the alleged embezzlement of moneys, which I think are Nos. 45, 46,

and 47. There are two classes of counts here. Counts 2, 3, and 4 relate specifically to surplus fees and emoluments of the clerk of the United States District Court; and as such clerk he is charged by those counts with embezzling that surplus. The other counts cover a disposition of funds in his hands without alleging the origin of them; but they all charge embezzlement. The expression "to embezzle" was settled in the Court of Appeals for this circuit
22 as sufficient, the same as the words "steal, take, and carry away," to show a wilful conversion unlawfully and fraudulently to one's own use. (Jewett v. United States, 100 Fed. Rep., 832, 837; Dickinson v. United States, 159 Fed. Rep., 801, 802.) In all these counts the descriptions of the funds alleged to have been embezzled is sufficient, because the grand jury specifies an amount and says that it is unable to give further information. Under several decisions of the Supreme Court that is sufficient, and my recollection is that it is sufficient until disproved. Counts 2, 3, and 4 relate, however, clearly to moneys which came into Mason's hands as fees and emoluments, and no fair consideration of the counts can leave out that limitation. All the other counts, while they have been discussed as based on this statute or that statute, contain finally a general charge of embezzlement, which is sufficient, as I have said, although perhaps they contain other matters which may be regarded as surplusage. They are so framed that, with reference to alleged embezzlements, the United States can rest them upon any statute which they will fit in a general way. Therefore, all those counts must stand on these demurrers. The demurrers, however, are not to each indictment as a whole, but to each and every count. So, notwithstanding some counts are good, other counts may be adjudged invalid.

A supposed fundamental question made by the parties is as to the nature of the title by which the clerk of the District Court holds the moneys he receives as fees and emoluments. The Supreme Court has characterized the nature of this title in two different ways; but in each case in a mere dictum relating not at all to any essential matter, each being disposed of on fundamental points to which the dictum had no necessary relation. Expressions in the case of United States
23 v. Hill, 123 U. S., 681, would indicate that, in the view of the court, the moneys, until some step was taken under the statutes other than the mere collection of them from litigants, are the moneys of the clerk. The other expression, cited by the United States, which was repeated by the Circuit Court of Appeals in this circuit in United States v. Mason, 129 Fed. Rep., 742, was again a mere dictum, but has a different outlook. To determine this precise point we have to look back to the time when these moneys were undoubtedly the moneys of the clerk as they were received. That was the law of the United States courts, in accordance with the law of Great Britain generally, that fees and emoluments are the property of the person receiving them, and this to such an extent that, under the common law, many offices were sold outright, and allowed to be sold, the purchase money being based upon the amount of fees and emoluments

which the holder of the office might receive. There was no question about that until the statute of 1853, now Revised Statutes, sections 823 and 828. To that time the whole question of the clerk's fees and emoluments was mostly a matter of tradition. Then the statute undertook to regulate the fees and emoluments of clerks, and did so to a certain extent, leaving still a large remnant as a matter of judicial practice. In United States v. Hill, 120 U. S., 169, the clerk prevailed on a question of usage necessary to enable the court to construe the act of 1853. All this indicates the nature of the right which we are considering. Yet whether under the present statutes the fees and emoluments received by him are the clerk's moneys quasi moneys, or whether they are moneys of the United States when they are received, and whether the surplus in his hands is his moneys until he has made the return which the statute requires, or whether they are moneys of the United States, one thing is clear, that by settled usage, and undoubtedly by the law, the clerk never deposits the fees and
24 emoluments under the subtreasury system of the United States. He always holds them in his own hands until he makes his return, when by the statute he is required to pay the surplus to the United States. He uses to some extent those moneys for his family expenses and for his own expenses; and there can be no question that an interpretation of the law which permits this is a reasonable one and a necessary one, because, aside from those moneys, the clerk is not supposed to have any resources for his support during the six months' period which his returns cover. Such is the practice, and such I have no doubt is the law; and so those moneys have never been covered by the subtreasury acts. Therefore, there is always a margin of doubt and question—sometimes large, sometimes small—but a margin of doubt and question as to what portion of those moneys belongs to the United States; that is, what is the surplus, and what portion belongs to the clerk.

As the result, there are two roads marked out by the statutes of the United States; one that of the subtreasury moneys, or moneys which the clerk necessarily pays into the subtreasury or some depository, and which can be drawn only by checks countersigned by the judge; and the other that of the moneys collected by the clerk as fees and emoluments, always an uncertain, undetermined amount until finally closed by an adjudication of the department satisfactory to the clerk, or by civil litigation in the courts. In view of the fact that section 5490 of the Revised Statutes, on which the United States orally bases one of its counts, will, on examination, be found to be a part of the subtreasury act of August 6, 1846, 9 Stat., 63, it has no relation to these proceedings, so far as they concern fees and emoluments
25 of the clerk's office; although I agree with the district attorney that the statute is a regulatory statute, intended to guard the finances of the United States by clear rules, and to point out positively the place where the moneys shall be deposited and what shall be done with them. The subtreasury system points out one path;

but what we have here relates to that uncertain state of accounts of which I have spoken, and to the moneys which the clerk is not required to deposit instantly, but which he may apply in part to his own personal uses or to his family uses, and which travel an entirely different road. That, in my judgment, is marked out by what was section 833 of the Revised Statutes, coupled with section 844. The two go together as parts of the act of 1853 about fees and must be read together.

I may, however, call attention to another statute which has not been explained to me, that is, the act of February 29, 1875, chapter 95, 18 Stat., page 333 and sequence. Section 5 of that act provides in substance that if any clerk shall wilfully refuse or neglect to make any report, certificate, or statement, or other document required by law to be by him made, or shall wilfully refuse or neglect to forward any such report, certificate, statement, or document to the department, officer, or person to whom by law the same should be forwarded, the President may remove him. Then the act provides further, in section 6, that if any such neglect or refusal occurs the clerk is guilty of a misdemeanor, and may be punished by fine not exceeding $1,000.00 or by imprisonment not exceeding one year.

Now, to my mind, there is, in all this, a plain, straight-forward system from the beginning to the end, distinguishing these
26 matters before us, so far as fees and emoluments are concerned, from all the statutes which related to the subtreasury of the United States. They are entirely separate and distinct systems. The United States are entitled to be protected by these statutes, and the clerk also is entitled to be protected by them; and, so far as they can relieve him from unjust litigation and from being charged with embezzlement, he is entitled to be relieved. Under sections 833 and 844, which provided not only for the semiannual returns, but also that, when the returns are made and not sooner, the clerk shall pay into the Treasury of the United States the amounts shown by them to be due from him, it is my opinion that the clerk can not be charged in any way criminally for any disposition of any part of the fees and emoluments received by him as fees and emoluments under any general provisions of the statutes of the United States with reference to embezzlement. If the clerk fails to make a return, or refuses to make a return, he may be proceeded against under the act of 1875; and whether, in the event he refuses or neglects to avail himself of the opportunity of explaining his finances given him by sections 833 and 844 of the Revised Statutes referred to, or whether, in the event he refuses or neglects to pay over a surplus which has been definitely ascertained on an adjustment of his accounts or by a civil suit, he can be proceeded against criminally under any other statute than that of 1875, I have no occasion to ascertain at present. Certainly I regard any proceeding of the character I am discussing, relating to moneys received by the clerk as fees and emoluments, as futile in law unless they allege that he refused to make his return, or

27 unless they allege that, if he made the return, he refuses to make payment at the end of the time provided by section 844. These allegations are lacking in the present case.

Therefore, the judgment will be that the three counts which do not relate to moneys received by the clerk as fees and emoluments are sufficient in law, and the respondent will be directed to answer over to them. So far as the other three counts are concerned, those which relate to moneys received by him as fees and emoluments, the counts are not sufficient in law, and are adjudged invalid; and, so far as those counts are concerned, the judgment will be that the respondent goes without day.

I will now take the other indictment. There the difficulty is a very serious one indeed. Whatever my conclusion, I have very great doubts. The difficulty comes, not from any general rules of law, but from the fact that Congress saw fit, in an appropriation act where it did not belong, to make a provision of the crudest character. Section 833 of the Revised Statutes provided for a semiannual return by the clerk, as well as by the district attorney and the marshal. Then at the close it contained the following: "Said returns shall be verified by the oath of the officer making them." The act of 1902, chapter 1301, 32 Stat., was a general sundry civil appropriation act, making appropriations for the fiscal year ending June 30, 1903. It was approved June 28, 1902, which was two days before the semiannual return of the clerk, the respondent here, was required to be made in accordance with section 833 of the Revised Statutes. It made no reservation of that return, but contained a repealing clause at page 881 that "all laws or parts of laws in conflict with the provisions of this act be and the same are hereby repealed." For a long time my mind was much taken up with the rules
28 in reference to the effect of repealing statutes, but difficulties underlie that. Two statutes can not stand in the same place any more than two persons can stand in the same place; and this statute, which was found in the bowels of the appropriation act, modified the form of return to be made, and omitted the requirement for an oath. In the form of the return some changes were very evidently important to be made. One was a mere matter of form, namely, it omitted the marshal and the district attorney, each at that time on a salary; and the other included specifically certain items which it classified as fees and emoluments which were not clearly included in any previous act. The provision does not purport to be an amendment. It contains on its face no reference to the Revised Statutes, that is, to the section in question, 833; it simply is made out of whole cloth. It reads, in fact, the same as though there had been no previous statute. Now, the repealing provision of the Revised Statutes does not seem to reach this case exactly. It does not seem to reach the case so far as the return of the clerk due July 1, 1902, was concerned. That is left in the air; but I need not trouble on this account, because there is no practical question about

it. This act of 1902 did, however, occupy the place occupied by section 833 of the Revised Statutes, and, therefore, in a certain sense, at least, it repealed it by inevitable effect.

The expressions of the Supreme Court are not always complete with reference to what are repealing statutes by implication. They ordinarily say that by implication a new statute does not repeal if it is possibly reconcilable with the old statute. The Supreme Court guards itself very carefully in that way, but it has sometimes failed to speak of the effect by implication of a statute which
29 covers the same ground as a previous statute, when it is impossible for the two to stand together. However, the question is not one of repeal, but whether or not Congress intended to bring forward from the Revised Statutes to the act of 1902 the provision for an oath. The difficulty in my mind is that that provision for an oath is for an oath to the return declared in section 833, while now I am asked to establish an oath to a return which is different, essentially different, in its subject-matter. Right there is where the question lies in my mind. If, however, I do not bring forward the provision for an oath in section 833, I repeal section 844 of the Revised Statutes, because section 833 relates to the same return as section 844, which requires that the clerk pay over the moneys. I would have to hold that Congress has unintentionally repealed all provisions for paying after the return is made. It is easy to imagine extreme cases where a reenactment of a statute would bring forward what was not in terms reenacted. Take a criminal statute imposing a penalty of life imprisonment, or of hanging, in case of murder. The statutes, as your Massachusetts statutes do, may define murder, the different degrees of murder, with a great deal of detail. Let the legislature reenact a new description of the details of the offence, but omit in terms to reenact the penalty. Both statutes could not stand together, but no court would venture to hold that the penalty was lost. That would be an extreme case. This, here, which is a matter of regulation, requires a longer stretch on the part of the court than the extreme case which I suggest. Nevertheless, with great doubt, and with the possibility of a revision of my views at a subsequent stage of the case, I think that I must hold that the provision for an oath has been brought forward by the intention of Congress or the inevitable condition of things, and that the court cannot disregard it.

30 The other objections to the indictment of which I am speaking are not so serious. They are not free from doubt, but still they are objections on which the views of the court are clearer. I have no doubt, although there is no express provision, that the oath may be taken by the district judge. There is a settled rule of law, of the common law, that a judge of a superior court is a magistrate who can take any oath which the law requires, either in court or out of court; and this rule has been adopted by the common practice in the United States in the federal courts, and applies to the judges of those courts. I think that Mr. Justice Swayne in the case cited here so

holds; and the Supreme Court in the case cited by him also so holds. At any rate, that is the settled practice. So the only question would be as to the effect of the act of 1902, whether the oath was required. If I am right in my view that the oath was required, then I am clear that the district judge had the right to take the oath. I am also clear that, if there was any question with reference to this return under the act of 1902 for investigation by the judge of the District Court, he had a right to take the oath in reference thereto whether there was any provision of statute therefor or not. But there does not seem to be any statute which rests upon the district judge any right or obligation to investigate that return. Therefore the case stands entirely, so far as we have gone, upon the correctness of my views whether or not I am entitled to hold and should hold that the provision for the oath in section 833 was brought forward into the act of 1902.

There is one other question: that is, that the indictment fails to allege that the return was made within the time fixed by statute. I look upon this matter of time as a mere regulation, which, of course, in my judgment, can not reach the vitals of this case; and,
31 therefore, I can not sustain that point.

The judgment on this indictment will be that the indictment is adjudged sufficient, and that the respondent must answer over.

The counsel will submit the proper interlocutory judgment on each indictment, according to this opinion.

A true record.

Attest:

CHARLES K. DARLING, *Clerk.*

32 *Opinion of the court.*

MARCH 4, 1910.

(Memorandum. The opinion of the court is here omitted by direction of counsel, it already having been incorporated as part of the plaintiff's bill of exceptions, and will be found printed in this transcript of record on page 21. Charles K. Darling, clerk.)

Petition of the United States of America for writ of error.

(Filed April 7, 1910.)

And now comes the United States of America, by its attorney, Asa P. French, and complains that in the record and proceedings and also in the rendition of a judgment in a plea between the petitioner and one Frank H. Mason, which was heard upon demurrer to the indictment in said cause in the Circuit Court of the United States for the District of Massachusetts, at the October term, A. D. 1909, to wit, on the ninth day of February, A. D. 1910, and was continued to and was further heard at the February term, A. D. 1910, to wit, on the third and fourth days of March, A. D. 1910, manifest error, hath intervened, to the great damage of the petitioner, in that the said court on the seventh day of April, A. D. 1910, did illegally and upon

an improper construction of the statutes of the United States, upon which said indictment was founded, sustain the demurrer to the second, third, and fourth counts of said indictment; wherefore the petitioner prays for the allowance of a writ of error, and such other process as may cause the same to be corrected by the Supreme Court of the United States.

UNITED STATES OF AMERICA,
by its Attorney.
ASA P. FRENCH.

33 *Assignment of errors.*

(Filed April 7, 1910.)

And the petitioner alleges that the Circuit Court, in the rendition of said judgment, erred as follows:

1. In sustaining the demurrer as to the second, third, and fourth counts of said indictment;

2. In ruling, in substance and effect, that the second count of said indictment did not well allege a violation by the defendant of section 5490 of the Revised Statutes of the United States;

3. In ruling, in substance and effect, that the third count of said indictment did not well allege a violation by the defendant of section 5490 of the Revised Statutes of the United States;

4. In ruling, in substance and effect, that the fourth count of said indictment did not well allege a violation by the defendant of the act of March 3, 1875, chapter 144 (18 Statutes at Large, chapter 479);

5. In ruling, in substance and effect, that the fees and emoluments collected and received by a clerk of a District Court of the United States under the provisions of the Revised Statutes of the United States, sections 823 and 828, regarding which fees and emoluments he is required to make a return, as provided in section 833 of the Revised Statutes of the United States, and in the act approved June 28, 1902 (32 Statutes at Large, chapter 1301), and the surplus of which he is required by law to pay into the Treasury of the United States under the provisions of section 844 of the Revised Statutes of the United States, are not the property and moneys of the United States, and that such fees can not become the subject of embezzlement by such clerk, either under section 5490 of the Revised Statutes of the United States, or under section 5497, or under the act of March 3, 1875, chapter 144 (18 Statutes at Large, chapter 479), or under any law
34 or laws of the United States:

6. In ruling, in substance, that such clerk can not be charged in any way criminally for any misapplication of any part of the moneys received by him as fees and emoluments of his office, whether surplus or not, under any general provisions of the statutes of the United States with reference to embezzlement.

UNITED STATES OF AMERICA,
By ASA P. FRENCH,
United States Attorney.

35 *Citation on writ of error.*

UNITED STATES OF AMERICA, ss:

The President of the United States, to Frank H. Mason, of Boston, in the State and District of Massachusetts, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the * eighteenth day of April next, pursuant to a writ of error filed in the clerk's office of the † Circuit Court of the United States for the District of Massachusetts, wherein the United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William L. Putnam, judge of the Circuit Court of the United States for the district of Massachusetts, this seventh day of April, in the year of our Lord one thousand nine hundred and ten.

W. L. PUTNAM,
U. S. Circuit Judge.

36 *Acknowledgment of service on citation on writ of error.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss.

BOSTON, *Apr. 7th, 1910.*

Due and sufficient service of the within citation is hereby acknowledged on behalf of the defendant.

GEO. L. WILSON,
Atty. for Deft.

37 *Clerk's certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss.

I, Charles K. Darling, Clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the foregoing is a true copy of the record in the cause entitled,

UNITED STATES, BY INDICTMENT,
v.
FRANK H. MASON,
} No. 45, Criminal Docket,

now pending in said Circuit Court, the petition for writ of error, the assignment of errors, and also the original citation on writ of

* Not exceeding 30 days from the day of signing.
† Name of court to which writ of error is directed.

error issued in said cause, with the acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said district, this 13th day of April, A. D. 1910.

[SEAL.] CHARLES K. DARLING, *Clerk.*

(Indorsement on cover:) File No. 22114, Massachusetts, C. C. U. S. Term No. 888. The United States, plaintiff in error, *vs.* Frank H. Mason. Filed April 18th, 1910. File No. 22114.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1913.

No. [redacted] 511

THE UNITED STATES, PLAINTIFF IN ERROR,

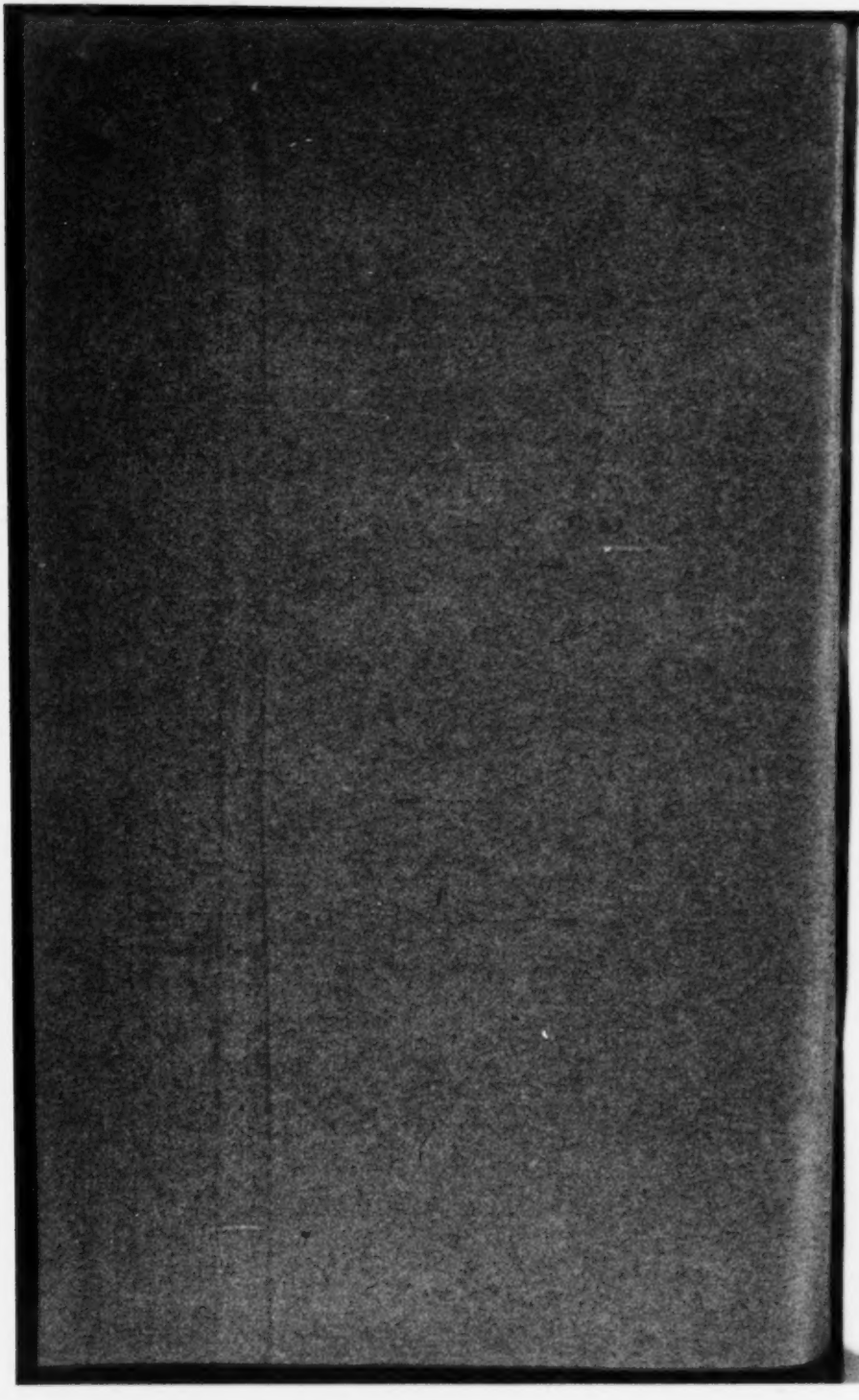
vs.

FRANK H. MASON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED APRIL 15, 1913.

(22115)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 889.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRANK H. MASON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

38134—10——1

1 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judge of the Circuit Court of the United States for the District of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, in a cause entitled United States, by indictment, against Frank H. Mason, defendant, a manifest error hath happened, to the great damage of the said United States, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under you seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, D. C., on the * eighteenth day of April next, in the said Supreme Court at Washington, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the seventh day of April, in the year of our Lord one thousand nine hundred and ten.

CHARLES K. DARLING,
Clerk of the Circuit Court of the United States,
District of Columbia.

Allowed by—

W. L. PUTNAM,
U. S. Circuit Judge.

April 7, 1910.

2 *Return of Circuit Court on writ of error.*

CIRCUIT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the judge of the Circuit Court of the United States, in and for the District of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said Circuit Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, Charles K. Darling, clerk of said Circuit Court of the United States, in and for the District of Massachusetts,

* Not exceeding 30 days from the day of signing the citation. Rule 14, sec. 5.

have hereto set my hand and the seal of said court this 13th day of April, A. D. 1910.

[SEAL.] CHARLES K. DARLING, *Clerk.*

3 *Transcript of record of circuit court.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on Wednesday, the twenty-third day of February, the last Tuesday of February being a legal holiday, in the year of our Lord one thousand nine hundred and ten.

Before the honorable Francis C. Lowell, circuit judge.

UNITED STATES, BY INDICTMENT,
v.
FRANK H. MASON. } No. 46, Criminal Docket.

4 This indictment was returned in the District Court of the United States for the District of Massachusetts, and was remitted to this Circuit Court upon the motion of the United States, by its attorney, Asa P. French, filed and allowed in said District Court, and was here entered at the October term, A. D. 1909.

Upon the entry of said cause in this Circuit Court the record of the District Court was remitted and is in the words and figures following:

5 *Record of the District Court.*

(Remitted to Circuit Court from District Court, January 1, 1910.)

INDICTMENT.

The United States of America.

At a District Court of the United States of America for the District of Massachusetts, begun and holden at Boston, within and for said district, on the first Tuesday of December in the year of our Lord one thousand nine hundred and nine.

First count. The jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that Frank H. Mason, of Boston, in said district, during all of the years nineteen hundred and seven and nineteen hundred and eight, was an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and, on the first day of February, in the year nineteen hundred and eight,

6 had in his possession and under his control, to wit, at Boston aforesaid, certain money of the United States, a particular

description whereof is to said grand jurors unknown, to the amount and value of three hundred and fifty-seven dollars and fifty cents, which during said year nineteen hundred and seven, had come into his possession and under his control in the execution of his office as such officer and clerk, and under authority and claim of authority as such officer and clerk, and which he should, on said first day of February, in the year nineteen hundred and eight, have accounted for and paid to the United States at Boston aforesaid in the manner provided by law; and that said Frank H. Mason, on said first day of February, in the year nineteen hundred and eight, at Boston aforesaid, the same money unlawfully and feloniously did embezzle.

Second count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason, during all of the years nineteen hundred and seven and nineteen hundred and eight was an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and, on said first day of February, in the year nineteen hundred and eight, had in his possession and under his control, to wit, at Boston aforesaid, certain public moneys of the United States, a particular description whereof is to said grand jurors unknown, to wit, moneys to the amount and of the value of three hundred and fifty-seven dollars and fifty cents, which during said year nineteen hundred and seven, had come into his possession and under his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and were a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year nineteen hundred and seven, which said public moneys said Frank H. Mason, on said first day of February, in the year nineteen hundred and eight, as such officer, was charged, by certain acts of Congress, to wit, sections 823, 828, and 844 of the Revised Statutes of the United States, and the act approved June 28, 1902, 32 Statutes at Large, chapter 1301, and by divers other acts of Congress, safely to keep; that
7 said Frank H. Mason, on said first day of February, in the year nineteen hundred and eight, at Boston aforesaid, the same public moneys unlawfully did fail safely to keep as required by said acts of Congress, and, on the contrary, the same then and there unlawfully did convert to his own use; and that thereby said Frank H. Mason then and there was guilty of embezzlement of said public moneys so converted.

Third count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason, during all of the years nineteen hundred and seven and nineteen hundred and eight was an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and on said first day of February, in the year nineteen hundred and eight, had in his possession and under his control, to wit, at Boston aforesaid, certain public moneys of the United States, a particular description whereof is to said grand jurors unknown, to wit, moneys to the

amount and of the value of three hundred and fifty-seven dollars and fifty cents, which during said year nineteen hundred and seven had come into his possession and under his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and were a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year nineteen hundred and seven, which said public moneys said Frank H. Mason, on said first day of February, in the year nineteen hundred and eight, as such officer, was charged, by certain acts of Congress, to wit, sections 823, 828, and 844 of the Revised Statutes of the United States, and the act approved June 28, 1902, 32 Statutes at Large, chapter 1301, and by divers other acts of Congress, safely to keep; that said Frank H. Mason, on said first day of February, in the year nineteen hundred and eight, at Boston aforesaid, the last-mentioned public moneys unlawfully did fail safely to keep as required by said acts of Congress, and, on the contrary, the same then and there unlawfully and fraudulently did convert to his own use, and that thereby said Frank H. Mason then and there was guilty of embezzlement of said public moneys so converted.

Fourth count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason during all of the years nineteen hundred and seven and nineteen hundred and eight was an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and on said first day of February, in the year nineteen hundred and eight, had in his possession and under his control, to wit, at Boston aforesaid, a portion of the money of the United States, a particular description whereof is to said grand jurors unknown, to wit, money to the amount and of the value of three hundred and fifty-seven dollars and fifty cents, which during said year nineteen hundred and seven had come into his possession and under his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and was a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year nineteen hundred and seven, which said money last aforesaid he should, on said first day of February, in the year nineteen hundred and eight, have paid to the United States, at Boston aforesaid, in the manner provided by law; and that said Frank H. Mason, on said first day of February, in the year nineteen hundred and eight, at Boston aforesaid, the same money unlawfully, wrongfully, and fraudulently did convert to his own personal use and embezzle.

Fifth count. And the jurors aforesaid, on their oath aforesaid, do further present that said Frank H. Mason, of Boston, in said district, at said Boston, on the twenty-third day of April in the year nineteen hundred and eight, said Mason being then and there an officer, to wit, the clerk of the District Court of the United States for the District of Massachusetts, and a person charged, by certain acts of Congress, to wit, sections 823, 828, and 844 of the Revised

Statutes of the United States, and the act approved June 28, 1902, 32 Statutes at Large, chapter 1301, and by divers other acts of Congress, with the safe-keeping of the public moneys of the said United States, and then and there having such public moneys in his charge as such officer and person, did then and there fail, in the manner following, safely to keep the same; that is to say, by unlawfully converting to his own use of the said public moneys the
9 amount and value of three hundred and fifty-seven dollars and fifty cents. Whereby and by force of the statute in such case made and provided, the said Frank H. Mason has committed the crime of embezzlement.

Sixth count. And the jurors aforesaid, on their oath aforesaid do further present that said Frank H. Mason, of Boston, in said district, at said Boston, on the twenty-third day of April in the year nineteen hundred and eight, said Mason being then and there an officer, to wit, the clerk of the District Court of the United States for the District of Massachusetts, and a person charged, by certain acts of Congress, to wit, sections 823, 828, and 844 of the Revised Statutes of the United States, and the act approved June 28, 1902, 32 Statutes at Large, chapter 1301, and by divers other acts of Congress with the safe-keeping of the public moneys of the said United States, and then and there having such public moneys in his charge as such officer and person, did then and there fail, in the manner following, safely to keep the same; that is to say, by unlawfully and fraudulently converting to his own use of the said public moneys the amount and value of three hundred and fifty-seven dollars and fifty cents. Whereby and by force of the statute in such case made and provided, the said Frank H. Mason has committed the crime of embezzlement.

The different counts herein are different descriptions of the same acts.

A true bill.

AARON GAY,
Foreman of the Grand Jury.
ASA P. FRENCH,
United States Attorney for the District of Massachusetts.

DISTRICT OF MASSACHUSETTS, *December 10, 1909.*

Returned into the court by the grand jurors and filed.

WILLIAM NELSON, *Deputy Clerk.*

10 United States District Court, Massachusetts District.

DECEMBER 31, 1909.

ALDRICH, J. And now it appearing to the court that the district attorney deems it necessary, it is ordered that this indictment be remitted to the next term and session of the Circuit Court of the United States for this district.

Attest:

WILLIAM NELSON, *Deputy Clerk.*

UNITED STATES OF AMERICA.

District Court, District of Massachusetts, December term, 1909.

UNITED STATES, BY INDICTMENT,
vs.
FRANK H. MASON.

Defendant's demurrer.

(Filed in the District Court December 31, 1909.)

And the said Frank H. Mason in his own proper person cometh into court here and demurs to the said indictment and each and every count thereof, and says that the said indictment and the matters therein contained, and each and every count thereof and the matters therein contained, in the manner and form as the same are above stated and set forth, are not sufficient in law, and that the said Frank H. Mason is not bound by the law of the land to answer the same, and this he is ready to verify.

Wherefore for want of sufficient indictment in this behalf the said defendant prays judgment and that by the court he may be dismissed and discharged from the said premises in the said court of said indictment.

And this defendant, not waiving his right to file further grounds for demurrer if he shall so desire, but insisting upon said right and upon his right to avail himself of all grounds of objection
11 under the above general demurrer, without filing any statement of the same, further demurs to the first count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because said count does not charge the defendant with any crime against the laws of the United States.

2. Because said count does not charge with sufficient certainty or particularity any violation of any statute of the United States.

3. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant fraudulently converted to the use of any person the moneys therein referred to, and because the allegation therein contained, that "said Frank H. Mason on said first day of February in the year 1908 at Boston aforesaid the said money unlawfully and feloniously did embezzle," is insufficient to charge such fraudulent conversion.

4. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant fraudulently embezzled the moneys therein referred to, and because the allegation therein contained, that "said Frank H. Mason on said first day of February in the year 1908 at Boston aforesaid the said money unlawfully and feloniously did embezzle," is insufficient to charge such embezzlement.

5. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant had not duly accounted to the United States for the moneys therein referred to.

6. Because the material allegation in said count that the moneys therein referred to came into the possession of or under the control of the defendant as clerk of the District Court of the United States is repugnant to and inconsistent with the material allegation in said count that said moneys were of the United States.

7. Because said count does not charge with sufficient certainty, or with any certainty, for or on what account, or for or on account of what services, emoluments, fees, or other consideration, the moneys therein referred to came into the possession and under the control of the defendant.

8. Because said count does not set forth with the certainty required by law any acts of the defendant constituting an
12 embezzlement of the moneys therein referred to within the intent of any statute of the United States, and because the allegations of said count are too indefinite and general to charge the defendant with the crime of embezzlement plainly, substantially, and with the certainty by law required.

9. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was not entitled to retain the moneys therein referred to on account of fees, salaries, or other indebtedness due to him from the United States, or for or on account of services performed by him as clerk as aforesaid.

And the defendant further demurs to the second count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because said count does not charge any crime against the laws of the United States or any violation of any statute of the United States.

2. Because said count does not charge with sufficient certainty any crime against the laws of the United States or any violation of any statute of the United States.

3. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was an officer or other person charged by an act of Congress with the safe-keeping of the public moneys.

4. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant wilfully or intentionally wrongfully failed to safely keep the moneys therein set forth without loaning, using, or converting the same to his own use.

5. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant fraudulently converted to the use of any person the moneys therein referred to.

6. Because the material allegation in said count that said moneys were public moneys of the United States is repugnant to and inconsistent with the material allegation therein that said moneys were a portion of a surplus of fees and emoluments of said office of clerk of the District Court of the United States for the District of Massachusetts.

13 7. Because said count fails to set forth with sufficient certainty, or with any certainty, the character and nature of the fees and emoluments for and on account of which said moneys came into the possession and under the control of the defendant.

8. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant had not duly accounted to the United States for the moneys therein referred to.

9. Because said count does not set forth with the certainty required by law any acts of the defendant constituting an embezzlement of the moneys therein referred to within the intent of any statute of the United States, and because the allegations of said count are too indefinite and general to charge the defendant with the crime of embezzlement plainly, substantially, and with the certainty by law required.

10. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was not entitled to retain the moneys therein referred to on account of fees, salaries, or other indebtedness due to him from the United States, or for or on account of services performed by him as clerk as aforesaid.

And the defendant further demurs to the third count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because said count does not charge any crime against the laws of the United States or any violation of any statute of the United States.

2. Because said count does not charge with sufficient certainty any crime against the laws of the United States or any violation of any statute of the United States.

3. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was an officer or other person charged by any act of Congress with the safe keeping of the public moneys.

4. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant wilfully or intentionally wrongfully failed to safely keep the moneys therein set forth without loaning, using, or converting the same to his own use.

14 5. Because the material allegation in said count that said moneys were public moneys of the United States is repugnant to and inconsistent with the material allegation therein that said moneys were a portion of a surplus of fees and emoluments of said office of clerk of the District Court of the United States for the District of Massachusetts.

6. Because said count fails to set forth with sufficient certainty, or with any certainty, the character and nature of the fees and emoluments for and on account of which said moneys came into the possession and under the control of the defendant.

7. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant had not duly accounted to the United States for the moneys therein referred to.

8. Because said count does not set forth with the certainty required by law any acts of the defendant constituting an embezzlement of the moneys therein referred to within the intent of any statute of the United States, and because the allegations o fsaid count are too indefinite and general to charge the defendant with the crime of embezzlement plainly, substantially, and with the certainty by law required.

9. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was not entitled to retain the moneys therein referred to on account of fees, salaries, or other indebtedness due to him from the United States, or for or on account of services performed by him as clerk as aforesaid.

And the defendant further demurs to the fourth count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because said count does not charge the defendant with any crime against the laws of the United States.

2. Because said count does not charge with sufficient certainty or particularity any violation of any statute of the United States.

3. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant had not duly accounted to the United States for the moneys therein referred to.

4. Because the material allegation in said count that said moneys were public moneys of the United States is repugnant to and inconsistent with the material allegation therein that said moneys were a portion of a surplus of fees and emoluments of said office of clerk of the District Court of the United States for the District of Massachusetts.

5. Because said count fails to set forth with sufficient certainty, or with any certainty, the character and nature of the fees and emoluments for and on account of which said moneys came into the possession and under the control of the defendant.

6. Because said count does not set forth with the certainty required by law any acts of the defendant constituting an embezzlement of the moneys therein referred to within the intent of any statute of the United States, and because the allegations of said count are too indefinite and general to charge the defendant with the crime of embezzlement plainly, substantially and with the certainty by law required.

7. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was not entitled to retain the moneys therein referred to on account of fees, salaries or other indebtedness due to him from the United States, or for or on account of services performed by him as clerk as aforesaid.

And the defendant further demurs to the fifth count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because said count does not charge the defendant with any crime against the laws of the United States.

2. Because said count does not charge with sufficient certainty or particularity any violation of any statute of the United States.

3. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant fraudulently converted to the use of any person the moneys therein referred to.

4. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant wilfully or intentionally wrongfully failed to safely keep the moneys therein set forth without loaning, using or converting the same to his own use.

5. Because said count does not charge with sufficient cer-
16 tainty, or with any certainty, that the defendant had not duly accounted to the United States for the moneys therein referred to.

6. Because the material allegation in said count that the moneys therein referred to came into the possession of or under the control of the defendant as clerk of the District Court of the United States is repugnant to and inconsistent with the material allegation in said count that said moneys were of the United States.

7. Because said count does not charge with sufficient certainty, or with any certainty, for or on what account, or for or on account of what services, emoluments, fees, or other consideration, the moneys therein referred to came into the possession and under the control of the defendant.

8. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was an officer or other person charged by any act of Congress with the safe keeping of the public moneys.

9. Because said count does not set forth with the certainty required by law any acts of the defendant constituting an embezzlement of the moneys therein referred to within the intent of any statute of the United States, and because the allegations of said count are too indefinite and general to charge the defendant with the crime of embezzlement plainly, substantially and with the certainty by law required.

10. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was not entitled to retain the moneys therein referred to on account of fees, salaries or other indebtedness due to him from the United States, or for or on account of services performed by him as clerk as aforesaid.

And the defendant further demurs to the sixth count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because said count does not charge the defendant with any crime against the laws of the United States.

2. Because said count does not charge with sufficient certainty or particularity any violation of any statute of the United States.

3. Because said count does not charge with sufficient cer-
17 tainty, or with any certainty, that the defendant wilfully or intentionally wrongfully failed to safely keep the moneys

therein set forth without loaning, using or converting the same to his own use.

4. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant had not duly accounted to the United States for the moneys therein referred to.

5. Because the material allegation in said count that the moneys therein referred to came into the possession of or under the control of the defendant as clerk of the District Court of the United States is repugnant to and inconsistent with the material allegation in said count that said moneys were of the United States.

6. Because said count does not charge with sufficient certainty, or with any certainty, for or on what account, or for or on account of what services, emoluments, fees or other consideration, the moneys therein referred to came into the possession and under the control of the defendant.

7. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was an officer or other person charged by any act of Congress with the safe keeping of the public moneys.

8. Because said count does not set forth with the certainty required by law any acts of the defendant constituting an embezzlement of the moneys therein referred to within the intent of any statute of the United States, and because the allegations of said count are too indefinite and general to charge the defendant with the crime of embezzlement plainly, substantially, and with the certainty by law required.

9. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was not entitled to retain the moneys therein referred to on account of fees, salaries, or other indebtedness due to him from the United States, or for or on account of services performed by him as clerk as aforesaid.

FRANK H. MASON.

BOYD B. JONES,
GEORGE L. WILSON,
Attorneys for Defendant.

18 In the District Court of the United States.

DISTRICT OF MASSACHUSETTS, *ss:*

No. 303, United States (by indictment) v. Frank H. Mason.
No. 304. Same v. Same.
No. 305. Same v. Same.
No. 306. Same v. Same.

Motion to remit indictments to the Circuit Court.

(Filed in District Court December 31, 1909.)

And now comes the United States and moves that the above-entitled indictments be remitted to the next session of the Circuit Court of

the United States for the District of Massachusetts, to wit, forthwith, in accordance with the provisions of section ten hundred and thirty-seven of the Revised Statutes.

UNITED STATES OF AMERICA,
By its attorney, ASA P. FRENCH.

I hereby certify that I deem it necessary, on the ground of propriety, that the above-entitled indictments be remitted to the Circuit Court as suggested in the foregoing motion.

ASA P. FRENCH,
United States Attorney.

DECEMBER 31, 1909.

Motion granted.
ALDRICH, J., *Presiding.*

19 On the ninth day of February, A. D. 1910, this cause was set down for hearing on demurrer and heard in part by the court, the honorable William L. Putnam, circuit judge, sitting.

This cause was thence continued to the present February term, A. D. 1910, when this cause comes on to be further heard on demurrer on the third and fourth days of March, A. D. 1910, the honorable William L. Putnam, circuit judge, sitting as aforesaid.

On the said fourth day of March, A. D. 1910, the opinion of the court is announced, ordering counsel to submit proper interlocutory judgment on the indictment.

On the seventh day of April, A. D. 1910, the following judgment on demurrer is entered in accordance with said opinion:

Judgment on demurrer.

APRIL 7, 1910.

PUTNAM, J. This cause came on to be heard on demurrer of the defendant, at this term of court, before the honorable William L. Putnam, circuit judge, and after the submission of briefs and supplemental briefs for both parties, and after oral argument by counsel, and after due consideration therein had, and after opinion rendered by the court and duly filed,

It is ordered, adjudged, and decreed that said demurrer be sustained as to the second, third, and fourth counts of said indictment, and that the defendant go without day as to said second, third, and fourth counts, and that said demurrer be overruled as to the first, fifth, and sixth counts of said indictment, and the defendant be allowed to answer over as to said first, fifth, and sixth counts.

By the court:

CHARLES K. DARLING, *Clerk.*

20 On the same day the following bill of exceptions of the United States is filed and allowed:

Bill of exceptions of the United States.

(Filed and allowed April 7, 1910.)

Be it remembered that on the seventh day of April, A. D. 1910, the demurrer of the defendant, Frank H. Mason, to the second, third, and fourth counts of the indictment in the above-entitled cause was sustained, and the United States duly excepted to the order of the court sustaining the demurrer to the said second, third, and fourth counts of said indictment, and its exception was allowed. A copy of the opinion of the court sustaining said demurrer to said counts is hereto annexed and made a part hereof, and the United States of America, by its attorney, Asa P. French, now presents this bill of exceptions to the court, and prays that the same may be signed by the court and allowed, and made a part of the record in this cause. It is further stipulated by the United States that if these exceptions are sustained, the defendant may be permitted to answer over to said second, third, and fourth counts of this indictment.

UNITED STATES OF AMERICA,
By ASA P. FRENCH,
United States Attorney.

APRIL 7, 1910.

Allowed:
W. L. PUTNAM, *Circuit Judge.*

21 Circuit Court of the United States, District of Massachusetts.

UNITED STATES
v.
FRANK H. MASON. } On demurrers. Nos. 45, 46, 47, and 48, criminal docket. Four indictments.

Opinion of the court.

MARCH 4, 1910.

PUTNAM, J., orally. I will first take up the indictments relating to the alleged embezzlement of moneys, which I think are Nos. 45, 46, and 47. There are two classes of counts here. Counts 2, 3, and 4 relate specifically to surplus fees and emoluments of the clerk of the United States District Court; and as such clerk he is charged by those counts with embezzling that surplus. The other counts cover a disposition of funds in his hands without alleging the origin of them; but they all charge embezzlement. The expression "to embezzle" was settled in the Court of Appeals for this circuit
22 as sufficient, the same as the words "steal, take, and carry away," to show a wilful conversion unlawfully and fraudulently to one's own use. Jewett vs. United States, 100 Fed. Rep., 832, 837; Dickinson vs. United States, 159 Fed. Rep., 801, 802. In

all these counts the descriptions of the funds alleged to have been embezzled is sufficient, because the grand jury specifies an amount and says that it is unable to give further information. Under several decisions of the Supreme Court that is sufficient, and my recollection is that it is sufficient until disproved. Counts 2, 3, and 4 relate, however, clearly to moneys which came into Mason's hands as fees and emoluments, and no fair consideration of the counts can leave out that limitation. All the other counts, while they have been discussed as based on this statute or that statute, contain finally a general charge of embezzlement, which is sufficient, as I have said, although perhaps they contain other matters which may be regarded as surplusage. They are so framed that, with reference to alleged embezzlements, the United States can rest them upon any statute which they will fit in a general way. Therefore, all those counts must stand on these demurrers. The demurrers, however, are not to each indictment as a whole, but to each and every count. So, notwithstanding some counts are good, other counts may be adjudged invalid.

A supposed fundamental question made by the parties is as to the nature of the title by which the clerk of the district court holds the moneys he receives as fees and emoluments. The Supreme Court has characterized the nature of this title in two different ways; but in each case in a mere dictum relating not at all to any essential matter, each being disposed of on fundamental points to which the dictum had no necessary relation. Expressions in the case of United
23 States v. Hill, 123 U. S., 681, would indicate that, in the view of the court, the moneys, until some step was taken under the statutes other than the mere collection of them from litigants, are the moneys of the clerk. The other expression, cited by the United States, which was repeated by the Circuit Court of Appeals in this circuit in United States v. Mason, 129 Fed. Rep., 742, was again a mere dictum, but has a different outlook. To determine this precise point we have to look back to the time when these moneys were undoubtedly the moneys of the clerk as they were received. That was the law of the United States courts, in accordance with the law of Great Britain generally, that fees and emoluments are the property of the person receiving them, and this to such an extent that, under the common law, many offices were sold outright, and allowed to be sold, the purchase money being based upon the amount of fees and emoluments which the holder of the office might receive. There was no question about that until the statute of 1853, now Revised Statutes, sections 823 and 828. To that time the whole question of the clerk's fees and emoluments was mostly a matter of tradition. Then the statute undertook to regulate the fees and emoluments of clerks, and did so to a certain extent, leaving still a large remnant as a matter of judicial practice. In United States v. Hill, 120 U. S., 169, the clerk prevailed on a question of usage necessary to enable the court to construe the act of 1853. All this indicates the nature of the right which we are considering. Yet whether under the present statutes

the fees and emoluments received by him are the clerk's moneys, quasi moneys, or whether they are moneys of the United States when they are received, and whether the surplus in his hands is his moneys until he has made the return which the statute requires, or whether they are moneys of the United States, one thing is clear, that by settled usage, and undoubtedly by the law, the clerk never deposits the fees
24 and emoluments under the subtreasury system of the United States. He always holds them in his own hands until he makes his return, when by the statute he is required to pay the surplus to the United States. He uses to some extent those moneys for his family expenses and for his own expenses; and there can be no question that an interpretation of the law which permits this is a reasonable one and a necessary one, because, aside from those moneys, the clerk is not supposed to have any resources for his support during the six months period which his returns cover. Such is the practice, and such I have no doubt is the law; and so those moneys have never been covered by the subtreasury acts. Therefore, there is always a margin of doubt and question—sometimes large, sometimes small—but a margin of doubt and question as to what portion of those moneys belongs to the United States, that is, what is the surplus and what portion belongs to the clerk.

As the result, there are two roads marked out by the statutes of the United States; one that of the subtreasury moneys, or moneys which the clerk necessarily pays into the subtreasury, or some depository, and which can be drawn only by checks countersigned by the judge; and the other that of the moneys collected by the clerk as fees and emoluments, always an uncertain, undetermined amount until finally closed by an adjudication of the department satisfactory to the clerk, or by civil litigation in the courts. In view of the fact that section 5490 of the Revised Statutes, on which the United States orally bases one of its counts, will, on examination, be found to be a part of the subtreasury act of August 6, 1846 (9 Stat., 63), it has no relation to these proceedings, so far as they concern fees and emolu-
25 ments of the clerk's office; although I agree with the district attorney that the statute is a regulatory statute, intended to guard the finances of the United States by clear rules, and to point out positively the place where the moneys shall be deposited, and what shall be done with them. The subtreasury system points out one path; but what we have here relates to that uncertain state of accounts of which I have spoken, and to the moneys which the clerk is not required to deposit instantly, but which he may apply in part to his own personal uses or to his family uses, and which travel an entirely different road. That, in my judgment, is marked out by what was section 833 of the Revised Statutes, coupled with section 844. The two go together as parts of the act of 1853 about fees, and must be read together.

I may, however, call attention to another statute which has not been explained to me, that is, the act of February 29, 1875, chapter 95, 18 Stat., page 333 and sequence. Section 5 of that act provides

in substance that, if any clerk shall wilfully refuse or neglect to make any report, certificate or statement, or other document, required by law to be by him made, or shall wilfully refuse or neglect to forward any such report, certificate, statement or document to the department, officer or person to whom by law the same should be forwarded, the President may remove him. Then the act provides further, in section 6, that if any such neglect or refusal occurs, the clerk is guilty of a misdemeanor, and may be punished by fine not exceeding $1,000.00 or by imprisonment not exceeding one year.

Now, to my mind, there is, in all this, a plain, straightforward system from the beginning to the end, distinguishing these
26 matters before us, so far as fees and emoluments are concerned, from all the statutes which related to the subtreasury of the United States. They are entirely separate and distinct systems. The United States are entitled to be protected by these statutes, and the clerk also is entitled to be protected by them; and, so far as they can relieve him from unjust litigation and from being charged with embezzlement, he is entitled to be relieved. Under sections 833 and 844, which provided, not only for the semiannual returns, but also that, when the returns are made, and not sooner, the clerk shall pay into the Treasury of the United States the amounts shown by them to be due from him, it is my opinion that the clerk can not be charged in any way criminally for any disposition of any part of the fees and emoluments received by him as fees and emoluments under any general provisions of the statutes of the United States with reference to embezzlement. If the clerk fails to make a return, or refuses to make a return, he may be proceeded against under the act of 1875; and whether, in the event he refuses or neglects to avail himself of the opportunity of explaining his finances given him by sections 833 and 844 of the Revised Statutes referred to, or whether, in the event he refuses or neglects to pay over a surplus which has been definitely ascertained on an adjustment of his accounts or by a civil suit, he can be proceeded against criminally under any other statute than that of 1875, I have no occasion to ascertain at present. Certainly I regard any proceeding of the character I am discussing, relating to moneys received by the clerk as fees and emoluments, as futile in law unless they allege that he refused to make his return, or unless they
27 allege that, if he made the return, he refuses to make payment at the end of the time provided by section 844. These allegations are lacking in the present case.

Therefore, the judgment will be that the three counts which do not relate to moneys received by the clerk as fees and emoluments are sufficient in law, and the respondent will be directed to answer over to them. So far as the other three counts are concerned, those which relate to moneys recived by him as fees and emoluments, the counts are not sufficient in law, and are adjudged invalid; and, so far as those counts are concerned, the judgment will be that the respondent goes without day.

I will now take the other indictment. There the difficulty is a very serious one indeed. Whatever my conclusion, I have very great

doubts. The difficulty comes, not from any general rules of law, but from the fact that Congress saw fit, in an appropriation act where it did not belong, to make a provision of the crudest character. Section 833 of the Revised Statutes provided for a semiannual return by the clerk, as well as by the district attorney and the marshal. Then at the close it contained the following: "Said returns shall be verified by the oath of the officer making them." The act of 1902, chapter 1301, 32 Stat., was a general sundry civil appropriation act, making appropriations for the fiscal year ending June 30, 1903. It was approved June 28, 1902, which was two days before the semiannual return of the clerk, the respondent here, was required to be made in accordance with section 833 of the Revised Statutes. It made no reservation of that return, but contained a repealing clause at page 881 that "all laws or parts of laws in conflict with the provisions of this act be and the same are hereby repealed." For
28 a long time my mind was much taken up with the rules in reference to the effect of repealing statutes, but difficulties underlie that. Two statutes can not stand in the same place any more than two persons can stand in the same place; and this statutes, which was found in the bowels of the appropriation act, modified the form of return to be made, and omitted the requirement for an oath. In the form of the return some changes were very evidently important to be made. One was a mere matter of form, namely, it omitted the marshal and the district attorney, each at that time on a salary; and the other included specifically certain items which it classified as fees and emoluments which were not clearly included in any previous act. The provision does not purport to be an amendment. It contains on its face no reference to the Revised Statutes, that is, to the section in question, 833; it simply is made out of whole cloth. It reads, in fact, the same as though there had been no previous statute. Now, the repealing provision of the Revised Statutes does not seem to reach this case exactly. It does not seem to reach the case so far as the return of the clerk due July 1, 1902, was concerned. That is left in the air; but I need not trouble on this account, because there is no practical question about it. This act of 1902 did, however, occupy the place occupied by section 833 of the Revised Statures, and, therefore, in a certain sense, at least, it repealed it by inevitable effect.

The expressions of the Supreme Court are not always complete with reference to what are repealing statutes by implication. They ordinarily say that by implication a new stature does not repeal if it is possibly reconcilable with the old statute. The Supreme Court guards itself very carefully in that way, but it has sometomes failed to speak of the effect by implication of a statute which covers
29 the same ground as a previous statute, when it is impossible for the two to stand together. However, the question is not one of repeal, but whether or not Congress intended to bring forward from the Revised Statutes to the act of 1902 the provision for an

oath. The difficulty in my mind is that that provision for an oath is for an oath to the return declared in section 833, while now I am asked to establish an oath to a return which is different, essentially different, in its subject matter. Right there is where the question lies in my mind. If, however, I do not bring forward the provision for an oath in section 833, I repeal section 844 of the Revised Statutes, because section 833 relates to the same return as section 844, which requires that the clerk pay over the moneys. I would have to hold that Congress has unintentionally repealed all provisions for paying after the return is made. It is easy to imagine extreme cases where a reenactment of a statute would bring forward what was not in terms reenacted. Take a criminal statute imposing a penalty of life imprisonment, or of hanging, in case of murder. The statutes, as your Massachusetts statutes do, may define murder, the different degrees of murder, with a great deal of detail. Let the legislature reenact a new description of the details of the offence, but omit in terms to reenact the penalty. Both statutes could not stand together, but no court would venture to hold that the penalty was lost. That would be an extreme case. This here, which is a matter of regulation, requires a longer stretch on the part of the court than the extreme case which I suggest. Nevertheless, with great doubt, and with the possibility of a revision of my views at a subsequent stage of the case, I think that I must hold that the provision for an oath has been brought forward by the intention of Congress or the inevitable condition of things, and that the court cannot disregard it.

30 The other objections to the indictment of which I am speaking are not so serious. They are not free from doubt, but still they are objections on which the views of the court are clearer. I have no doubt, although there is no express provision, that the oath may be taken by the district judge. There is a settled rule of law, of the common law, that a judge of a superior court is a magistrate who can take any oath which the law requires, either in court or out of court; and this rule has been adopted by the common practice in the United States in the federal courts, and applies to the judges of those courts. I think that Mr. Justice Swayne in the case cited here so holds; and the Supreme Court in the case cited by him also so holds. At any rate, that is the settled practice. So the only question would be as to the effect of the act of 1902, whether the oath was required. If I am right in my view that the oath was required, then I am clear that the district judge had the right to take the oath. I am also clear that, if there was any question with reference to this return under the act of 1902 for investigation by the judge of the District Court, he had a right to take the oath in reference thereto whether there was 'ny provision of statute therefor or not. But there does not seem to be any statute which rests upon the district judge any right or obligation to investigate that return. Therefore, the case stands entirely, so far as we have gone, upon the correctness of my views whether or

not I am entitled to hold and should hold that the provision for the oath in section 833 was brought forward into the act of 1902.

There is one other question; that is, that the indictment fails to allege that the return was made within the time fixed by statute. I look upon this matter of time as a mere regulation, which of course, in my judgment, can not reach the vitals of this case; and, there-
31 fore, I can not sustain that point.

The judgment on this indictment will be that the indictment is adjudged sufficient, and that the respondent must answer over.

The counsel will submit the proper interlocutory judgment on each indictment, according to this opinion.

A true record.

Attest:

CHARLES K. DARLING, *Clerk.*

32 *Opinion of the court.*

MARCH 4, 1910.

(MEMORANDUM.—The opinion of the court is here omitted by direction of counsel, it already having been incorporated as part of the plaintiff's bill of exceptions, and will be found printed in this transcript of record on page 21. Charles K. Darling, clerk.)

Petition of the United States of America for writ of error.

(Filed April 7, 1910.)

And now comes the United States of America, by its attorney Asa P. French, and complains that in the record and proceedings and also in the rendition of a judgment in a plea between the petitioner and one Frank H. Mason, which was heard upon demurrer to the indictment in said cause in the Circuit Court of the United States for the District of Massachusetts, at the October term, A. D. 1909, to wit, on the ninth day of February, A. D. 1910, and was continued to and was further heard at the February term, A. D. 1910, to wit, on the third and fourth days of March, A. D. 1910, manifest error hath intervened, to the great damage of the petitioner, in that the said court on the seventh day of April, A. D. 1910, did illegally and upon an improper construction of the statutes of the United States, upon which said indictment was founded, sustain the demurrer to the second, third, and fourth counts of said indictment; wherefore the petitioner prays for the allowance of a writ of error, and such other process as may cause the same to be corrected by the Supreme Court of the United States.

UNITED STATES OF AMERICA,
By its attorney ASA P. FRENCH.

33 *Assignment of errors.*

(Filed April 7, 1910.)

And the petitioner alleges that the Circuit Court, in the rendition of said judgment, erred as follows:

1. In sustaining the demurrer as to the second, third, and fourth counts of said indictment;

2. In ruling, in substance and effect, that the second count of said indictment did not well allege a violation by the defendant of section 5490 of the Revised Statutes of the United States;

3. In ruling, in substance and effect, that the third count of said indictment did not well allege a violation by the defendant of section 5490 of the Revised Statutes of the United States;

4. In ruling, in substance and effect, that the fourth count of said indictment did not well allege a violation by the defendant of the act of March 3, 1875, chapter 144 (18 Statutes at Large, Chapter 479);

5. In ruling, in substance and effect, that the fees and emoluments collected and received by a clerk of a district court of the United States under the provisions of the Revised Statutes of the United States, sections 823 and 828, regarding which fees and emoluments he is required to make a return, as provided in section 833 of the Revised Statutes of the United States, and in the act approved June 28, 1902, (32 Statutes at Large, Chapter 1301), and the surplus of which he is required by law to pay into the treasury of the United States under the provisions of section 844 of the Revised Statutes of the United States, are not the property and moneys of the United States, and that such fees can not become the subject of embezzlement by such clerk, either under section 5490 of the Revised Statutes of the United States, or under section 5497, or under the act of March 3, 1875, chapter 144 (18 Statutes at Large, Chapter 479), or
34 under any law or laws of the United States;

6. In ruling, in substance, that such clerk cannot be charged in any way criminally for any misapplication of any part of the moneys received by him as fees and emoluments of his office, whether surplus or not, under any general provisions of the statutes of the United States with reference to embezzlement.

UNITED STATES OF AMERICA,
By ASA P. FRENCH,
United States Attorney.

35 *Citation on writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Frank H. Mason, of Boston, in the State and District of Massachusetts, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the * eighteenth day of April, current, pursuant to a writ of error

* Not exceeding 30 days from the day of signing.

filed in the clerk's office of the † Circuit Court of the United States for the District of Massachusetts, wherein the United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable William L. Putnam, judge of the Circuit Court of the United States for the District of Massachusetts, this seventh day of April, in the year of our Lord one thousand nine hundred and ten.

W. L. PUTNAM,
U. S. Circuit Judge.

36 *Acknowledgment of service on citation on writ of error.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

BOSTON, *Apr. 7th, 1910.*

Due and sufficient service of the within citation is hereby acknowledged on behalf of the defendant.

GEO. L. WILSON,
Atty. for Deft.

37 *Clerk's certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Charles K. Darling, clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the foregoing is a true copy of the record in the cause entitled,

UNITED STATES, BY INDICTMENT, *v.* FRANK H. MASON,	No. 46, criminal docket,

now pending in said Circuit Court, the petition for writ of error, the assignment of errors, and also the original citation on writ of error issued in said cause, with the acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said district, this 13th day of April, A. D. 1910.

[SEAL.] CHARLES K. DARLING, *Clerk.*

(Indorsement on cover:) File No. 22,115. Massachusetts, C. C. U. S. Term No. 889. The United States, plaintiff in error, vs. Frank H. Mason. Filed April 18th, 1910. File No. 22,115.

† Name of court to which writ of error is directed.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 512

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRANK E. MASON.

IN ERROR TO THE SUPREME COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED APRIL 19, 1910.

(22116)

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1909.

No. 890.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRANK H. MASON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

1 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judge of the Circuit Court of the United States for the District of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, in a cause entitled United States, by indictment, against Frank H. Mason, defendant, a manifest error hath happened, to the great damage of the said United States as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, D. C., on the * eighteenth day of April next, in the said Supreme Court at Washington, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the seventh day of April, in the year of our Lord one thousand nine hundred and ten.

CHARLES K. DARLING,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

W. L. PUTNAM,
U. S. Circuit Judge.

APRIL 7, 1910.

2 *Return of Circuit Court on writ of error.*

CIRCUIT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the judge of the Circuit Court of the United States, in and for the District of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said Circuit Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, Charles K. Darling, clerk of said Circuit Court of the United States, in and for the District of Massachusetts,

* Not exceeding 30 days from the day of signing the citation. Rule 14, sec. 5.

have hereto set my hand and the seal of said court this 13th day of April, A. D. 1910.

[SEAL.] CHARLES K. DARLING, *Clerk.*

3 *Transcript of record of Circuit Court.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on Wednesday, the twenty-third day of February, the last Tuesday of February being a legal holiday, in the year of our Lord one thousand nine hundred and ten.

Before the Honorable Francis C. Lowell, circuit judge.

UNITED STATES, BY INDICTMENT,
v.
FRANK H. MASON. } No. 47, criminal docket.

4 This indictment was returned in the District Court of the United States for the District of Massachusetts, and was remitted to this Circuit Court upon the motion of the United States, by its attorney, Asa P. French, filed and allowed in said District Court, and was here entered at the October term, A. D. 1909.

Upon the entry of said cause in this Circuit Court the record of the District Court was remitted and is in the words and figures following:

5 *Record of the District Court.*

(Remitted to Circuit Court from District Court, January 1, 1910.)

INDICTMENT.

The United States of America.

At a District Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said district, on the first Tuesday of December in the year of our Lord one thousand nine hundred and nine.

First count. The jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that Frank H. Mason, of Boston, in said district, during all of the years nineteen hundred and six and nineteen hundred and seven, was an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and, on the first day of February, in the year nineteen hundred and seven,

6 had in his possession and under his control, to wit, at Boston aforesaid, certain money of the United States, a particular description whereof is to said grand jurors unknown, to the amount

and value of three hundred and fifty dollars, which during said year nineteen hundred and six, had come into his possession and under his control in the execution of his office as such officer and clerk, and under authority and claim of authority as such officer and clerk, and which he should, on said first day of February, in the year nineteen hundred and seven, have accounted for and paid to the United States, at Boston aforesaid, in the manner provided by law; and that said Frank H. Mason, on said first day of February, in the year nineteen hundred and seven, at Boston aforesaid, the same money unlawfully and feloniously did embezzle.

Second count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason, during all of the years nineteen hundred and six and nineteen hundred and seven was an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and, on said first day of February, in the year nineteen hundred and seven, had in his possession and under his control, to wit, at Boston aforesaid, certain public moneys of the United States, a particular description whereof is to said grand jurors unknown, to wit, moneys to the amount and of the value of three hundred and fifty dollars, which during said year nineteen hundred and six, had come into his possession and under his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and were a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year nineteen hundred and six, which said public moneys said Frank H. Mason, on said first day of February, in the year nineteen hundred and seven, as such officer, was charged, by certain acts of Congress, to wit, sections 823, 828, and 844 of the Revised Statutes of the United States, and the act approved June 28, 1902, 32 Statutes at Large, chapter 1301, and by divers other acts of Congress, safely to keep; that said Frank H. Mason, on said
7 first day of February, in the year nineteen hundred and seven, at Boston aforesaid, the same public moneys unlawfully did fail safely to keep as required by said acts of Congress, and, on the contrary, the same then and there unlawfully did convert to his own use, and that thereby said Frank H. Mason then and there was guilty of embezzlement of said public moneys so converted.

Third count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason during all of the years nineteen hundred and six and nineteen hundred and seven was an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and on said first day of February, in the year nineteen hundred and seven, had in his possession and under his control, to wit, at Boston aforesaid, certain public moneys of the United States, a particular description whereof is to said grand jurors unknown, to wit, moneys to the amount and of the value of three hundred and fifty dollars, which during said year nineteen hundred and six had come into his possession and under

his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and were a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year nineteen hundred and six, which said public moneys said Frank H. Mason, on said first day of February, in the year nineteen hundred and seven, as such officer, was charged, by certain acts of Congress, to wit, sections 823, 828, and 844 of the Revised Statutes of the United States, and the act approved June 28, 1902, 32 Statutes at Large, chapter 1301, and by divers other acts of Congress, safely to keep; that said Frank H. Mason, on said first day of February, in the year nineteen hundred and seven, at Boston aforesaid, the last-mentioned public moneys unlawfully did fail safely to keep as required by said acts of Congress, and, on the contrary, the same then and there unlawfully and fraudulently did convert to his own use; and that thereby said Frank H. Mason then and there was guilty of embezzlement of said public moneys so converted.

Fourth count. And the jurors aforesaid, on their oath afore-
8 said, do further present, that said Frank H. Mason, during all of the years nineteen hundred and six and nineteen hundred and seven, was an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and, on said first day of February, in the year nineteen hundred and seven, had in his possession and under his control, to wit, at Boston aforesaid, a portion of the money of the United States, a particular description whereof is to said grand jurors unknown, to wit, money to the amount and of the value of three hundred and fifty dollars, which during said year nineteen hundred and six, had come into his possession and under his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and was a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year nineteen hundred and six, which said money he should, on said first day of February, in the year nineteen hundred and seven, have paid to the United States, at Boston aforesaid, in the manner provided by law; and that said Frank H. Mason, on said first day of February, in the year nineteen hundred and seven, at Boston aforesaid, the same money unlawfully, wrongfully, and fraudulently did convert to his own personal use and embezzle.

Fifth count. And the jurors aforesaid, on their oath aforesaid, do further present that said Frank H. Mason, of Boston, in said district, at said Boston, on the thirteenth day of March, in the year nineteen hundred and seven, said Mason being then and there an officer, to wit, the clerk of the District Court of the United States for the District of Massachusetts, and a person charged, by certain acts of Congress, to wit, sections 823, 828, and 844 of the Revised Statutes of the United States, and the act approved June 28, 1902,

32 Statutes at Large, chapter 1301, and by divers other acts of Congress, with the safe-keeping of the public moneys of the said United States, and then and there having such public moneys in his charge as such officer and person, did then and there fail, in the manner following, safely to keep the same; that is to say, by unlawfully converting to his own use of the said public moneys the
9 amount and value of three hundred and fifty dollars.

Whereby, and by force of the statute in such case made and provided, the said Frank H. Mason has committed the crime of embezzlement.

Sixth count. And the jurors aforesaid, on their oath aforesaid, do further present that said Frank H. Mason, of Boston, in said district, at said Boston, on the thirteenth day of March, in the year nineteen hundred and seven, said Mason being then and there an officer, to wit, the clerk of the District Court of the United States for the District of Massachusetts, and a person charged, by certain acts of Congress, to wit, sections 823, 828, and 844 of the Revised Statutes of the United States, and the act approved June 28, 1902, 32 Statutes at Large, chapter 1301, and by divers others acts of Congress, with the safe keeping of the public moneys of the said United States, and then and there having such public moneys in his charge as such officer and person, did then and there fail, in the manner following, safely to keep the same, that is to say, by unlawfully and fraudulently converting to his own use of the said public moneys the amount and value of three hundred and fifty dollars. Whereby and by force of the statute in such case made and provided, the said Frank H. Mason has committed the crime of embezzlement.

The different counts herein are different descriptions of the same acts.

A true bill.

AARON GAY,
Foreman of the Grand Jury.
ASA P. FRENCH,
United States Attorney for the District of Massachusetts.

DISTRICT OF MASSACHUSETTS, *December 10, 1909.*

Returned into the court by the grand jurors and filed.

WILLIAM NELSON, *Deputy Clerk.*

10 United States District Court, Massachusetts District.

DECEMBER 31, 1909.

ALDRICH, J. And now it appearing to the court, that the district attorney deems it necessary; it is ordered that this indictment be remitted to the next term and session of the Circuit Court of the United States for this district.

Attest:

WILLIAM NELSON, *Deputy Clerk.*

UNITED STATES OF AMERICA.

District Court, District of Massachusetts, December term, 1909.

UNITED STATES, BY INDICTMENT,
vs.
FRANK H. MASON.

Defendant's demurrer.

(Filed in District Court December 31, 1909.)

And the said Frank H. Mason in his own proper person cometh into court here and demurs to the said indictment and each and every count thereof, and says that the said indictment and the matters therein contained, and each and every count thereof and the matters therein contained, in the manner and form as the same are above stated and set forth, are not sufficient in law, and that the said Frank H. Mason is not bound by the law of the land to answer the same, and this he is ready to verify.

Wherefore for want of sufficient indictment in this behalf the said defendant prays judgment and that by the court he may be dismissed and discharged from the said premises in the said court of said indictment.

And this defendant, not waiving his right to file further grounds for demurrer if he shall so desire, but insisting upon said right and upon his right to avail himself of all grounds of objection
11 under the above general demurrer, without filing any statement of the same, further demurs to the first count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because said count does not charge the defendant with any crime against the laws of the United States.

2. Because said count does not charge with sufficient certainty or particularity any violation of any statute of the United States.

3. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant fraudulently converted to the use of any person the moneys therein referred to, and because the allegation therein contained, that "said Frank H. Mason on said first day of February in the year 1908 at Boston aforesaid the said money unlawfully and feloniously did embezzle," is insufficient to charge such fraudulent conversion.

4. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant fraudulently embezzled the moneys therein referred to, and because the allegation therein contained, that "said Frank H. Mason on said first day of February in the year 1908 at Boston aforesaid the said money unlawfully and feloniously did embezzle," is insufficient to charge such embezzlement.

5. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant had not duly accounted to the United States for the moneys therein referred to.

6. Because the material allegation in said count that the moneys therein referred to came into the possession of or under the control of the defendant as clerk of the District Court of the United States is repugnant to and inconsistent with the material allegation in said count that said moneys were of the United States.

7. Because said count does not charge with sufficient certainty, or with any certainty, for or on what account, or for or on account of what services, emoluments, fees, or other consideration, the moneys therein referred to came into the possession and under the control of the defendant.

8. Because said count does not set forth with the certainty required by law any acts of the defendant constituting an em-
12 bezzlement of the moneys therein referred to within the intent of any statute of the United States, and because the allegations of said count are too indefinite and general to charge the defendant with the crime of embezzlement plainly, substantially and with the certainty by law required.

9. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was not entitled to retain the moneys therein referred to on acount of fees, salaries, or other indebtedness due to him from the United States, or for or on account of services performed by him as clerk as aforesaid.

And the defendant further demurs to the second count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because said count does not charge any crime against the laws of the United States or any violation of any statute of the United States.

2. Because said count does not charge with sufficient certainty any crime against the laws of the United States or any violation of any statute of the United States.

3. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was an officer or other person charged by any act of Congress with the safe keeping of the public moneys.

4. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant wilfully or intentionally wrongfully failed to safely keep the moneys therein set forth without loaning, using, or converting the same to his own use.

5. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant fraudulently converted to the use of any person the moneys therein referred to.

6. Because the material allegation in said count that said moneys were public moneys of the United States is repugnant to and inconsistent with the material allegation therein that said moneys were a portion of a surplus of fees and emoluments of said office of clerk

of the District Court of the United States for the District of Massachusetts.

13 7. Because said count fails to set forth with sufficient certainty, or with any certainty, the character and nature of the fees and emoluments for and on account of which said moneys came into the possession and under the control of the defendant.

8. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant had not duly accounted to the United States for the moneys therein referred to.

9. Because said count does not set forth with the certainty required by law any acts of the defendant constituting an embezzlement of the moneys therein referred to within the intent of any statute of the United States, and because the allegations of said count are too indefinite and general to charge the defendant with the crime of embezzlement plainly, substantially and with the certainty by law required.

10. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was not entitled to retain the moneys therein referred to on account of fees, salaries, or other indebtedness due to him from the United States, or for or on account of services performed by him as clerk as aforesaid.

And the defendant further demurs to the third count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because said count does not charge any crime against the laws of the United States or any violation of any statute of the United States.

2. Because said count does not charge with sufficient certainty any crime against the laws of the United States or any violation of any statute of the United States.

3. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was an officer or other person charged by any act of Congress with the safe keeping of the public moneys.

4. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant wilfully or intentionally wrongfully failed to safely keep the moneys therein set forth without loaning, using, or converting the same to his own use.

14 5. Because the material allegation in said count that said moneys were public moneys of the United States is repugnant to and inconsistent with the material allegation therein that said moneys were a portion of a surplus of fees and emoluments of said office of clerk of the District Court of the United States for the District of Massachusetts.

6. Because said count fails to set forth with sufficient certainty, or with any certainty, the character and nature of the fees and emoluments for and on account of which said moneys came into the possession and under the control of the defendant.

7. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant had not duly accounted to the United States for the moneys therein referred to.

8. Because said count does not set forth with the certainty required by law any acts of the defendant constituting an embezzlement of the moneys therein referred to within the intent of any statute of the United States, and because the allegations of said count are too indefinite and general to charge the defendant with the crime of embezzlement plainly, substantially, and with the certainty by law required.

9. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was not entitled to retain the moneys therein referred to on account of fees, salaries, or other indebtedness due to him from the United States, or for or on account of services performed by him as clerk as aforesaid.

And the defendant further demurs to the fourth count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because said count does not charge the defendant with any crime against the laws of the United States.

2. Because said count does not charge with sufficient certainty or particularity any violation of any statute of the United States.

3. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant had not duly accounted to the United States for the moneys therein referred to.

4. Because the material allegation in said count that said moneys were public moneys of the United States is repugnant to and inconsistent with the material allegation therein that said moneys were a portion of a surplus of fees and emoluments of said office of clerk of the District Court of the United States for the District of Massachusetts.

5. Because said count fails to set forth with sufficient certainty, or with any certainty, the character and nature of the fees and emoluments for and on account of which said moneys came into the possession and under the control of the defendant.

6. Because said count does not set forth with the certainty required by law any acts of the defendant constituting an embezzlement of the moneys therein referred to within the intent of any statute of the United States, and because the allegations of said count are too indefinite and general to charge the defendant with the crime of embezzlement plainly, substantially, and with the certainty by law required.

7. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was not entitled to retain the moneys therein referred to on account of fees, salaries, or other indebtedness due to him from the United States, or for or on account of services performed by him as clerk as aforesaid.

And the defendant further demurs to the fifth count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because said count does not charge the defendant with any crime against the laws of the United States.

2. Because said count does not charge with sufficient certainty or particularity any violation of any statute of the United States.

3. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant fraudulently converted to the use of any person the moneys therein referred to.

4. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant wilfully or intentionally wrongfully failed to safely keep the moneys therein set forth without loaning, using, or converting the same to his own use.

5. Because said count does not charge with sufficient cer-
16 tainty, or with any certainty, that the defendant had not duly accounted to the United States for the moneys therein referred to.

6. Because the material allegation in said count that the moneys therein referred to came into the possession of or under the control of the defendant as clerk of the District Court of the United States is repugnant to and inconsistent with the material allegation in said count that said moneys were of the United States.

7. Because said count does not charge with sufficient certainty, or with any certainty, for or on what account, or for or on account of what services, emoluments, fees, or other consideration, the moneys therein referred to came into the possession and under the control of the defendant.

8. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was an officer or other person charged by any act of Congress with the safe keeping of the public moneys.

9. Because said count does not set forth with the certainty required by law any acts of the defendant constituting an embezzlement of the moneys therein referred to within the intent of any statute of the United States, and because the allegations of said count are too indefinite and general to charge the defendant with the crime of embezzlement plainly, substantially, and with the certainty by law required.

10. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was not entitled to retain the moneys therein referred to on account of fees, salaries, or other indebtedness due to him from the United States, or for or on account of services performed by him as clerk as aforesaid.

And the defendant further demurs to the sixth count of said indictment and specially assigns the following causes and grounds of demurrer:

1. Because said count does not charge the defendant with any crime against the laws of the United States.

2. Because said count does not charge with sufficient certainty or particularity any violation of any statute of the United States.

3. Because said count does not charge with sufficient cer-
17 tainty, or with any certainty, that the defendant wilfully or

intentionally wrongfully failed to safely keep the moneys therein set forth without loaning, using, or converting the same to his own use.

4. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant had not duly accounted to the United States for the moneys therein referred to.

5. Because the material allegation in said count that the moneys therein referred to came into the possession of or under the control of the defendant as clerk of the District Court of the United States is repugnant to and inconsistent with the material allegation in said count that said moneys were of the United States.

6. Because said count does not charge with sufficient certainty, or with any certainty, for or on what account, or for or on account of what services, emoluments, fees, or other consideration, the moneys therein referred to came into the possession and under the control of the defendant.

7. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was an officer or other person charged by any act of Congress with the safe keeping of the public moneys.

8. Because said count does not set forth with the certainty required by law any acts of the defendant constituting an embezzlement of the moneys therein referred to within the intent of any statute of the United States, and because the allegations of said count are too indefinite and general to charge the defendant with the crime of embezzlement plainly, substantially, and with the certainty by law required.

9. Because said count does not charge with sufficient certainty, or with any certainty, that the defendant was not entitled to retain the moneys therein referred to on account of fees, salaries, or other indebtedness due to him from the United States, or for or on account of services performed by him as clerk as aforesaid.

FRANK H. MASON.

BOYD B. JONES,
GEORGE L. WILSON,
Attorneys for Defendant.

18 In the District Court of the United States.

DISTRICT OF MASSACHUSETTS, *ss:*

No. 303, United States (by indictment) v. Frank H. Mason.
No. 304. Same v. Same.
No. 305. Same v. Same.
No. 306. Same v. Same.

Motion to remit indictments to the Circuit Court.

(Filed in District Court December 31, 1909.)

And now comes the United States and moves that the above-entitled indictments be remitted to the next session of the Circuit

Court of the United States for the District of Massachusetts, to wit, forthwith, in accordance with the provisions of section ten hundred and thirty-seven of the Revised Statutes.

UNITED STATES OF AMERICA,
By its Attorney, ASA P. FRENCH.

I hereby certify that I deem it necessary, on the ground of propriety, that the above-entitled indictments be remitted to the Circuit Court as suggested in the foregoing motion.

ASA P. FRENCH,
United States Attorney.

DECEMBER 31, 1909.

Motion granted.
ALDRICH, J., *Presiding.*

19 On the ninth day of February, A. D. 1910, this cause was set down for hearing on demurrer and heard in part by the court, the honorable William L. Putnam, circuit judge, sitting.

This cause was thence continued to the present February term, A. D. 1910, when this cause comes on to be further heard on demurrer on the third and fourth days of March, A. D. 1910, the honorable William L. Putnam, circuit judge, sitting as aforesaid.

On the said fourth day of March, A. D. 1910, the opinion of the court is announced, ordering counsel to submit proper interlocutory judgment on the indictment.

On the seventh day of April, A. D. 1910, the following judgment on demurrer is entered in accordance with said opinion:

Judgment on demurrer.

APRIL 7, 1910.

PUTNAM, J. This cause came on to be heard on demurrer of the defendant, at this term of court, before the honorable William L. Putnam, circuit judge, and after the submission of briefs and supplemental brief for both parties, and after oral argument by counsel, and after due consideration therein had, and after opinion rendered by the court and duly filed,

It is ordered, adjudged, and decreed that said demurrer be sustained as to the second, third, and fourth counts of said indictment, and that the defendant go without day as to said second, third, and fourth counts, and that said demurrer be overruled as to the first, fifth, and sixth counts of said indictment, and the defendant be allowed to answer over as to said first, fifth, and sixth counts.

By the court:

CHARLES K. DARLING, *Clerk.*

On the same day the following bill of exceptions of the United States is filed and allowed:

Bill of exceptions of the United States.

(Filed and allowed April 7, 1910.)

Be it remembered that on the seventh day of April, A. D. 1910, the demurrer of the defendant, Frank H. Mason, to the second, third, and fourth counts of the indictment in the above entitled cause was sustained, and the United States duly excepted to the order of the court sustaining the demurrer to the said second, third, and fourth counts of said indictment, and its exception was allowed. A copy of the opinion of the court sustaining said demurrer to said counts is hereto annexed and made a part hereof, and the United States of America, by its attorney, Asa P. French, now presents this bill of exceptions to the court, and prays that the same may be signed by the court and allowed and made a part of the record in this cause. It is further stipulated by the United States that if these exceptions are sustained the defendant may be permitted to answer over to said second, third, and fourth counts of this indictment.

UNITED STATES OF AMERICA,
By ASA P. FRENCH, *United States Attorney.*

APRIL 7, 1910.

Allowed:

W. L. PUTNAM, *Circuit Judge.*

Circuit Court of the United States, District of Massachusetts.

UNITED STATES *v.* FRANK H. MASON. } On demurrers. Nos. 45, 46, 47, and 48, criminal docket. Four indictments.

Opinion of the court.

MARCH 4, 1910.

PUTNAM, J., orally. I will first take up the indictments relating to the alleged embezzlement of moneys, which I think are Nos. 45, 46, and 47. There are two classes of counts here. Counts 2, 3, and 4 relate specifically to surplus fees and emoluments of the clerk of the United States District Court; and as such clerk he is charged by those counts with embezzling that surplus. The other counts cover a disposition of funds in his hands without alleging the origin of them; but they all charge embezzlement. The expression "to embezzle" was settled in the Court of Appeals for this circuit as sufficient, the same as the words "steal, take, and carry away," to show a wilful conversion unlawfully and fraudulently to one's own use. Jewett vs. United States, 100 Fed. Rep.,

832, 837; Dickinson vs. United States, 159 Fed. Rep., 801, 802. In all these counts the descriptions of the funds alleged to have been embezzled is sufficient, because the grand jury specifies an amount and says that it is unable to give further information. Under several decisions of the Supreme Court that is sufficient, and my recollection is that it is sufficient until disproved. Counts 2, 3, and 4 relate, however, clearly to moneys which came into Mason's hands as fees and emoluments, and no fair consideration of the counts can leave out that limitation. All the other counts, while they have been discussed as based on this statute or that statute, contain finally a general charge of embezzlement, which is sufficient, as I have said, although, perhaps, they contain other matters which may be regarded as surplusage. They are so framed that, with reference to alleged embezzlements, the United States can rest them upon any statute which they will fit in a general way. Therefore, all those counts must stand on these demurrers. The demurrers, however, are not to each indictment as a whole, but to each and every count. So, notwithstanding some counts are good, other counts may be adjudged invalid.

A supposed fundamental question made by the parties is as to the nature of the title by which the clerk of the District Court holds the moneys he receives as fees and emoluments. The Supreme Court has characterized the nature of this title in two different ways; but in each case in a mere dictum relating not at all to any essential matter, each being disposed of on fundamental points to which the dictum had no necessary relation. Expressions in the case of
23 United States v. Hill, 123 U. S., 681, would indicate that, in the view of the court, the moneys, until some step was taken under the statutes other than the mere collection of them from litigants, are the moneys of the clerk. The other expression, cited by the United States, which was repeated by the Circuit Court of Appeals in this circuit in United States v. Mason, 129 Fed. Rep., 742, was again a mere dictum, but has a different outlook. To determine this precise point we have to look back to the time when these moneys were undoubtedly the moneys of the clerk as they were received. That was the law of the United States courts, in accordance with the law of Great Britain generally, that fees and emoluments are the property of the person receiving them, and this to such an extent that, under the common law, many offices were sold outright, and allowed to be sold, the purchase money being based upon the amount of fees and emoluments which the holder of the office might receive. There was no question about that until the statute of 1853, now Revised Statutes, sections 823 and 828. To that time the whole question of the clerk's fees and emoluments was mostly a matter of tradition. Then the statute undertook to regulate the fees and emoluments of clerks, and did so to a certain extent, leaving still a large remnant as a matter of judicial practice. In United States v. Hill, 120 U. S., 169, the clerk prevailed on a question of usage necessary to enable the court to construe the act of 1853. All this indicates the nature of the right which we are considering. Yet whether under the present statutes

the fees and emoluments received by him are the clerk's moneys, quasi moneys, or whether they are moneys of the United States when they are received, and whether the surplus in his hands is his moneys until he has made the return which the statute requires, or whether they are moneys of the United States, one thing is clear, that by settled usage, and undoubtedly by the law, the clerk never
24 deposits the fees and emoluments under the subtreasury system of the United States. He always holds them in his own hands until he makes his return, when by the statute he is required to pay the surplus to the United States. He uses to some extent those moneys for his family expenses and for his own expenses; and there can be no question that an interpretation of the law which permits this is a reasonable one and a necessary one, because, aside from those moneys, the clerk is not supposed to have any resources for his support during the six months period which his returns cover. Such is the practice, and such I have no doubt is the law; and so those moneys have never been covered by the subtreasury acts. Therefore, there is always a margin of doubt and question—sometimes large, sometimes small—but a margin of doubt and question as to what portion of those moneys belongs to the United States—that is, what is the surplus, and what portion belongs to the clerk.

As the result, there are two roads marked out by the statutes of the United States; one that of the subtreasury moneys, or moneys which the clerk necessarily pays into the subtreasury, or some depository, and which can be drawn only by checks countersigned by the judge; and the other that of the moneys collected by the clerk as fees and emoluments, always an uncertain, undetermined amount until finally closed by an adjudication of the department satisfactory to the clerk, or by civil litigation in the courts. In view of the fact that section 5490 of the Revised Statutes, on which the United States orally bases one of its counts, will, on examination, be found to be a part of the subtreasury act of August 6, 1846, 9 Stat., 63, it has no relation to these proceedings, so far as they
25 concern fees and emoluments of the clerk's office; although I agree with the district attorney that the statute is a regulatory statute, intended to guard the finances of the United States by clear rules, and to point out positively the place where the moneys shall be deposited, and what shall be done with them. The subtreasury system points out one path; but what we have here relates to that uncertain state of accounts of which I have spoken, and to the moneys which the clerk is not required to deposit instantly, but which he may apply in part to his own personal uses or to his family uses, and which travel an entirely different road. That, in my judgment, is marked out by what was section 833 of the Revised Statutes, coupled with section 844. The two go together as parts of the act of 1853 about fees, and must be read together.

I may, however, call attention to another statute which has not been explained to me, that is, the act of February 29, 1875, chapter

95, 18 Stat., page 333 and sequence. Section 5 of that act provides in substance that, if any clerk shall wilfully refuse or neglect to make any report, certificate or statement, or other document, required by law to be by him made, or shall wilfully refuse or neglect to forward any such report, certificate, statement or document to the department, officer or person to whom by law the same should be forwarded, the President may remove him. Then the act provides further, in section 6, that if any such neglect or refusal occurs, the clerk is guilty of a misdemeanor, and may be punished by fine not exceeding $1,000.00 or by imprisonment not exceeding one year.

Now, to my mind, there is, in all this, a plain, straightforward system from the beginning to the end, distinguishing these
26 matters before us, so far as fees and emoluments are concerned, from all the statutes which related to the subtreasury of the United States. They are entirely separate and distinct systems. The United States are entitled to be protected by these statutes, and the clerk also is entitled to be protected by them; and, so far as they can relieve him from unjust litigation and from being charged with embezzlement, he is entitled to be relieved. Under sections 833 and 844, which provided, not only for the semiannual returns, but also that, when the returns are made, and not sooner, the clerk shall pay into the Treasury of the United States the amounts shown by them to be due from him, it is my opinion that the clerk can not be charged in any way criminally for any disposition of any part of the fees and emoluments received by him as fees and emoluments under any general provisions of the statutes of the United States with reference to embezzlement. If the clerk fails to make a return, or refuses to make a return, he may be proceeded against under the act of 1875; and whether, in the event he refuses or neglects to avail himself of the opportunity of explaining his finances given him by sections 833 and 844 of the Revised Statutes referred to, or whether, in the event he refuses or neglects to pay over a surplus which has been definitely ascertained on an adjustment of his accounts or by a civil suit, he can be proceeded against criminally under any other statute than that of 1875, I have no occasion to ascertain at present. Certainly I regard any proceeding of the character I am discussing, relating to moneys received by the clerk as fees and emoluments, as futile in law unless they allege that he refused to make his return, or unless
27 they allege that, if he made the return, he refuses to make payment at the end of the time provided by section 844. These allegations are lacking in the present case.

Therefore, the judgment will be that the three counts which do not relate to moneys received by the clerk as fees and emoluments are sufficient in law, and the respondent will be directed to answer over to them. So far as the other three counts are concerned, those which relate to moneys received by him as fees and emoluments, the counts are not sufficient in law, and are adjudged invalid; and, so far as those counts are concerned, the judgment will be that the respondent goes without day.

I will now take the other indictment. There the difficulty is a very serious one indeed. Whatever my conclusion, I have very great doubts. The difficulty comes, not from any general rules of law, but from the fact that Congress saw fit, in an appropriation act where it did not belong, to make a provision of the crudest character. Section 833 of the Revised Statutes provided for a semiannual return by the clerk as well as by the district attorney and the marshal. Then at the close it contained the following: "Said returns shall be verified by the oath of the officer making them." The act of 1902, chapter 1301, 32 Stat., was a general sundry civil appropriation act, making appropriations for the fiscal year ending June 30, 1903. It was approved June 28, 1902, which was two days before the semiannual return of the clerk, the respondent here, was required to be made in accordance with section 833 of the Revised Statutes. It made no reservation of that return, but contained a repealing clause at page 881 that "all laws or parts of laws in conflict with the provisions of this act be, and the same are hereby, repealed." For
28 a long time my mind was much taken up with the rules in reference to the effect of repealing statutes, but difficulties underlie that. Two statutes cannot stand in the same place any more than two persons can stand in the same place; and this statute, which was found in the bowels of the appropriation act, modified the form of return to be made, and omitted the requirement for an oath. In the form of the return some changes were evidently important to be made. One was a mere matter of form, namely, it omitted the marshal and the district attorney, each at that time on a salary; and the other included specifically certain items which it classified as fees and emoluments which were not clearly included in any previous act. The provision does not purport to be an amendment. It contains on its face no reference to the Revised Statutes, that is, to the section in question, 833; it simply is made out of whole cloth. It reads, in fact, the same as though there had been no previous statute. Now, the repealing provision of the Revised Statutes does not seem to reach this case exactly. It does not seem to reach the case so far as the return of the clerk, due July 1, 1902, was concerned. That is left in the air; but I need not trouble on this account, because there is no practical question about it. This act of 1902 did, however, occupy the place occupied by section 833 of the Revised Statutes, and, therefore, in a certain sense, at least, it repealed it by inevitable effect.

The expressions of the Supreme Court are not always complete with reference to what are repealing statutes by implication. They ordinarily say that by implication a new statute does not repeal if it is possibly reconcilable with the old statute. The Supreme Court guards itself very carefully in that way, but it has sometimes failed to speak of the effect by implication of a statute which covers
29 the same ground as a previous statute, when it is impossible for the two to stand together. However, the question is not one of repeal, but whether or not Congress intended to bring forward from the Revised Statutes to the act of 1902 the provision for an oath.

The difficulty in my mind is that that provision for an oath is for an oath to the return declared in section 833, while now I am asked to establish an oath to a return which is different, essentially different, in its subject-matter. Right there is where the question lies in my mind. If, however, I do not bring forward the provision for an oath in section 833, I repeal section 844 of the Revised Statutes, because section 833 relates to the same return as section 844, which requires that the clerk pay over the moneys. I would have to hold that Congress has unintentionally repealed all provisions for paying after the return is made. It is easy to imagine extreme cases where a reenactment of a statute would bring forward what was not in terms reenacted. Take a criminal statute imposing a penalty of life imprisonment or of hanging in case of murder. The statutes, as your Massachusetts statutes do, may define murder, the different degrees of murder, with a great deal of detail. Let the legislature reenact a new description of the details of the offence, but omit in terms to reenact the penalty. Both statutes could not stand together, but no court would venture to hold that the penalty was lost. That would be an extreme case. This here, which is a matter of regulation, requires a longer stretch on the part of the court than the extreme case which I suggest. Nevertheless, with great doubt, and with the possibility of a revision of my views at a subsequent stage of the case, I think that I must hold that the provision for an oath has been brought forward by the intention of Congress or the inevitable condition of things, and that the court can not disregard it.

30 The other objections to the indictment of which I am speaking are not so serious. They are not free from doubt, but still they are objections on which the views of the court are clearer. I have no doubt, although there is no express provision, that the oath may be taken by the district judge. There is a settled rule of law, of the common law, that a judge of a superior court is a magistrate who can take any oath which the law requires, either in court or out of court; and this rule has been adopted by the common practice in the United States in the federal courts, and applies to the judges of those courts. I think that Mr. Justice Swayne in the case cited here so holds; and the Supreme Court in the case cited by him also so holds. At any rate, that is the settled practice. So the only question would be as to the effect of the act of 1902, whether the oath was required. If I am right in my view that the oath was required, then I am clear that the district judge had the right to take the oath. I am also clear that, if there was any question with reference to this return under the act of 1902 for investigation by the judge of the District Court, he had a right to take the oath in reference thereto whether there was any provision of statute therefor or not. But there does not seem to be any statute which rests upon the district judge any right or obligation to investigate that return. Therefore, the case stands entirely, so far as we have gone, upon the

correctness of my views whether or not I am entitled to hold and should hold that the provision for the oath in section 833 was brought forward into the act of 1902.

There is one other question; that is, that the indictment fails to allege that the return was made within the time fixed by statute. I look upon this matter of time as a mere regulation, which of course, in my judgment, cannot reach the vitals of this case; and, 31 therefore, I cannot sustain that point.

The judgment on this indictment will be that the indictment is adjudged sufficient, and that the respondent must answer over.

The counsel will submit the proper interlocutory judgment on each indictment, according to this opinion.

A true record.

Attest:

CHARLES K. DARLING, *Clerk.*

32 *Opinion of the court.*

MARCH 4, 1910.

(MEMORANDUM.—The opinion of the court is here omitted by direction of counsel, it already having been incorporated as part of the plaintiff's bill of exceptions, and will be found printed in this transcript of record on page 21. Charles K. Darling, clerk.)

Petition of the United States of America for writ of error.

(Filed April 7, 1910.)

And now comes the United States of America, by its attorney, Asa P. French, and complains that in the record and proceedings and also in the rendition of a judgment in a plea between the petitioner and one Frank H. Mason, which was heard upon demurrer to the indictment in said cause in the Circuit Court of the United States for the District of Massachusetts, at the October term, A. D. 1909, to wit, on the ninth day of February, A. D. 1910, and was continued to, and was further heard at the February term, A. D. 1910, to wit, on the third and fourth days of March, A. D. 1910, manifest error hath intervened, to the great damage of the petitioner, in that the said court on the seventh day of April, A. D. 1910, did illegally and upon an improper construction of the statutes of the United States, upon which said indictment was founded, sustained the demurrer to the second, third, and fourth counts of said indictment; wherefore the petitioner prays for the allowance of a writ of error, and such other process as may cause the same to be corrected by the Supreme Court of the United States.

UNITED STATES OF AMERICA,
By its attorney, ASA P. FRENCH.

33 *Assignment of errors.*

(Filed April 7, 1910.)

And the petitioner alleges that the Circuit Court, in the rendition of said judgment, erred as follows:

1. In sustaining the demurrer as to the second, third, and fourth counts of said indictment;

2. In ruling, in substance and effect, that the second count of said indictment did not well allege a violation by the defendant of section 5490 of the Revised Statutes of the United States;

3. In ruling, in substance and effect, that the third count of said indictment did not well allege a violation by the defendant of section 5490 of the Revised Statutes of the United States;

4. In ruling, in substance and effect, that the fourth count of said indictment did not well allege a violation by the defendant of the act of March 3, 1875, chapter 144 (18 Statutes at Large, chapter 479);

5. In ruling, in substance and effect, that the fees and emoluments collected and received by a clerk of a district court of the United States under the provisions of the Revised Statutes of the United States, sections 823 and 828, regarding which fees and emoluments he is required to make a return, as provided in section 833 of the Revised Statutes of the United States, and in the act approved June 28, 1902 (32 Statutes at Large, chapter 1301), and the surplus of which he is required by law to pay into the Treasury of the United States under the provisions of section 844 of the Revised Statutes of the United States, are not the property and moneys of the United States, and that such fees cannot become the subject of embezzlement by such clerk, either under section 5490 of the Revised Statutes of the United States or under section 5497, or under the act of March 3, 1875, chapter 144 (18 Statutes at Large, chapter 479), or

34 under any law or laws of the United States;

6. In ruling, in substance, that such clerk cannot be charged in any way criminally for any misapplication of any part of the moneys received by him as fees and emoluments of his office, whether surplus or not, under any general provisions of the statutes of the United States with reference to embezzlement.

UNITED STATES OF AMERICA,
By ASA P. FRENCH,
United States Attorney.

35 *Citation on writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to Frank H. Mason, of Boston, in the State and District of Massachusetts, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington,

D. C., on the* eighteenth day of April next, pursuant to a writ of error filed in the clerk's office of the † Circuit Court of the United States for the District of Massachusetts wherein the United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the honorable William L. Putnam, judge of the Circuit Court of the United States for the District of Massachusetts this seventh day of April, in the year of our Lord one thousand nine hundred and ten.

W. L. PUTNAM,
U. S. Circuit Judge.

36 *Acknowledgment of service on citation on writ of error*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

BOSTON, *Apr. 7, 1910.*

Due and sufficient service of the within citation is hereby acknowledged on behalf of the defendant.

GEO. T. WILSON,
Atty. for Deft.

37 *Clerk's certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Charles K. Darling, clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the foregoing is a true copy of the record in the cause entitled,

UNITED STATES, BY INDICTMENT,
v.
FRANK H. MASON,
} No. 47 criminal docket,

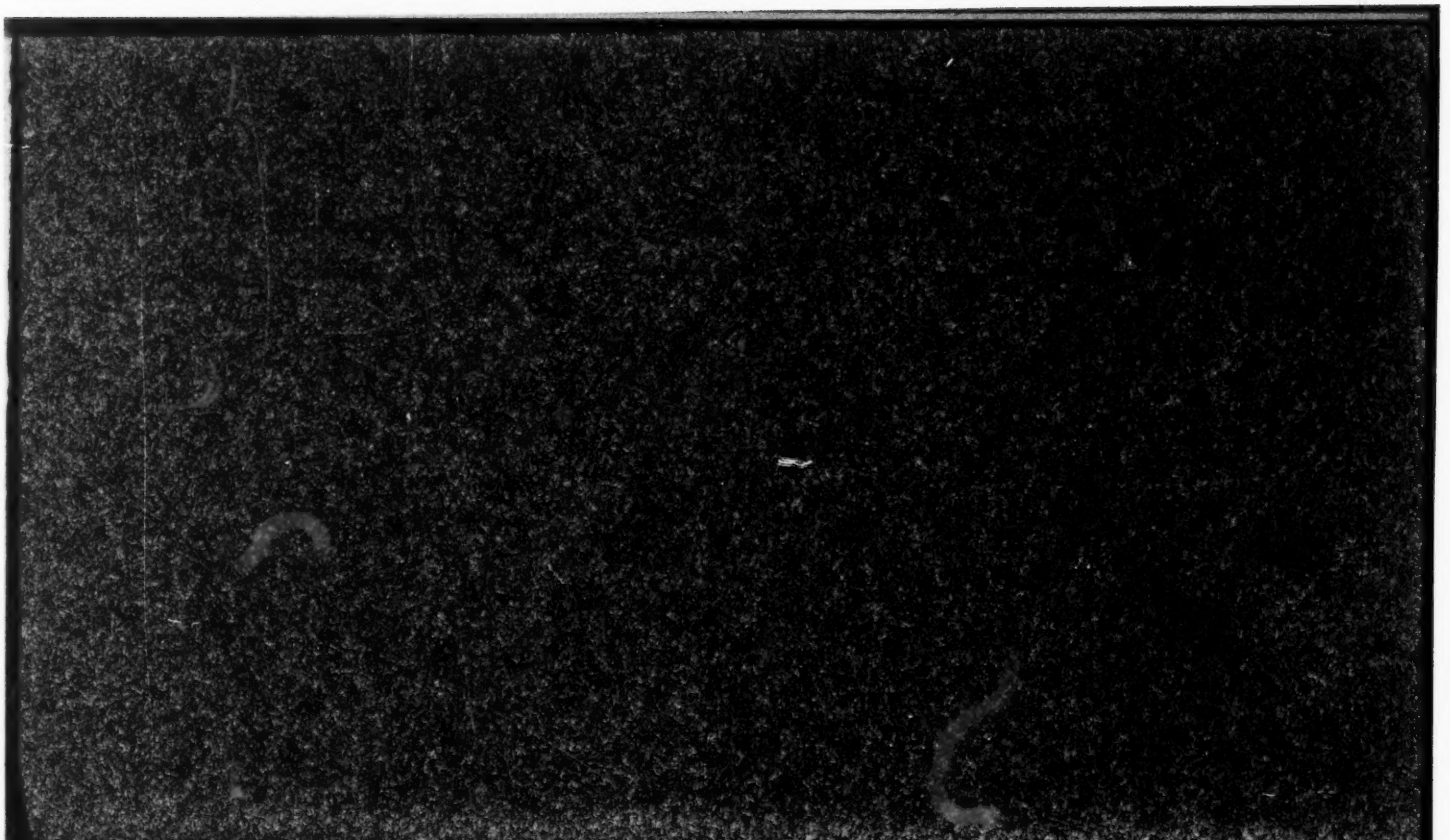
now pending in said Circuit Court, the petition for writ of error, the assignment of errors, and also the original citation on writ of error issued in said cause, with the acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said district, this 13th day of April, A. D. 1910.

[SEAL.] CHARLES K. DARLING, *Clerk.*

(Indorsement on cover:) File No., 22116. Massachusetts, C. C. U. S. Term No., 890. The United States, plaintiff in error, *vs.* Frank H. Mason. Filed April 18th, 1910. File No., 22116.

† Name of court to which writ of error is directed.
* Not exceeding 30 days from the day of signing.



In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
FRANK H. MASON. } No. 888.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
FRANK H. MASON. } No. 889.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
FRANK H. MASON. } No. 890.

MOTION TO ADVANCE.

Frank H. Mason, defendant in error in the three above entitled cases, was indicted in the District Court of the United States for the District of Massachusetts on December 10, 1909, and the indictment remitted to the Circuit Court for the same district. The defendant, a former clerk of the District Court of the United States, was charged with having embezzled certain moneys which came into his hands as fees and emoluments of office above the compensation

and allowance legally permitted to be retained by him. The cases are alike except as to the amount charged in each indictment to have been embezzled. Demurrers to each count of each indictment were filed, and were sustained by the court as to counts two, three, and four of each of the indictments.

The cases are here under the criminal appeals act, in accordance with the provisions of which the Solicitor-General moves the court to advance the cases on the docket for hearing on a day convenient to the court during the next term.

Notice of this motion has been served upon opposing counsel.

LLOYD W. BOWERS,
Solicitor-General.

APRIL, 1910.

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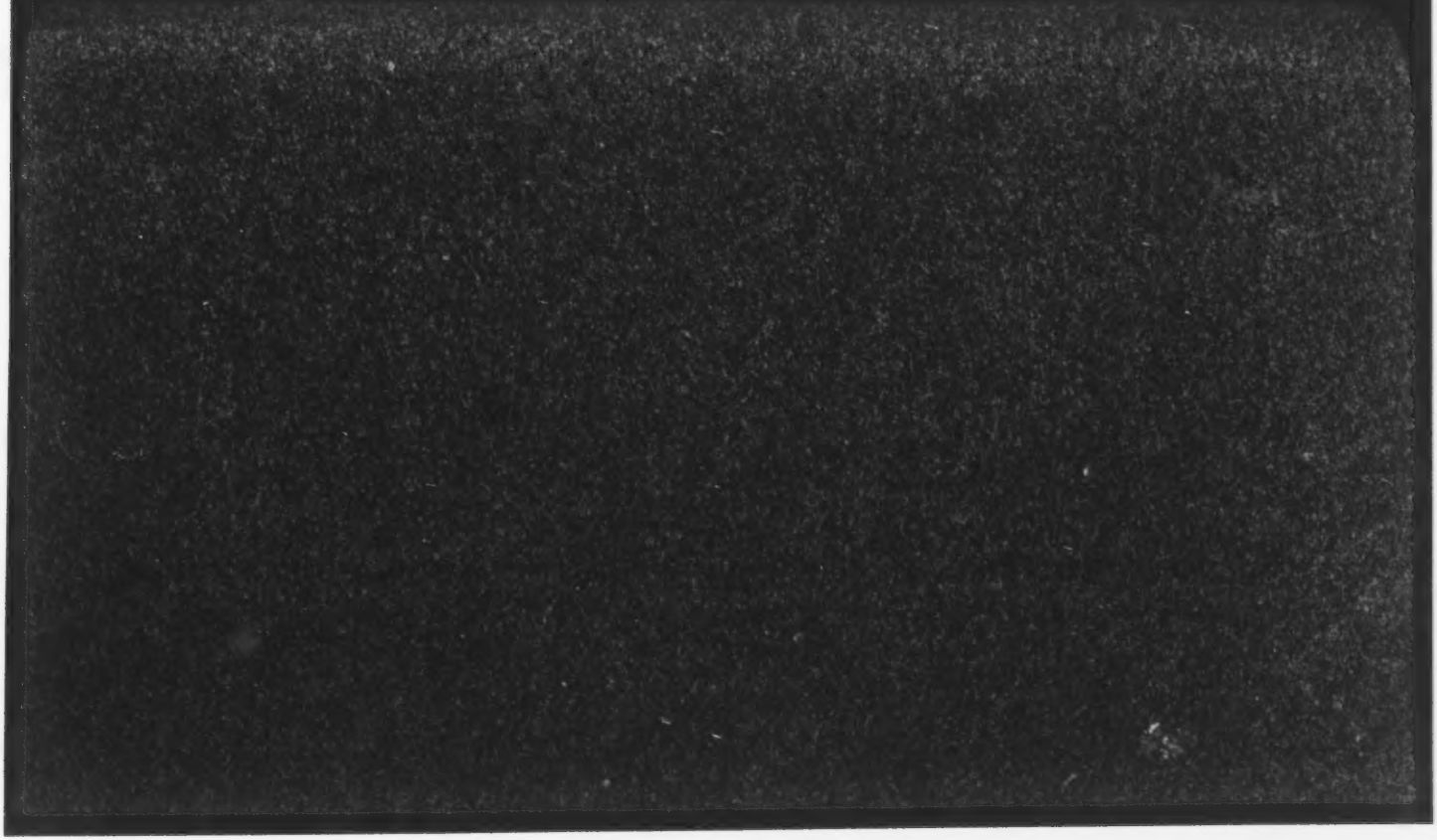

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN ERROR, v. FRANK H. MASON. } No. 510.

THE UNITED STATES, PLAINTIFF IN ERROR, v. FRANK H. MASON. } No. 511.

THE UNITED STATES, PLAINTIFF IN ERROR, v. FRANK H. MASON. } No. 512.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE NO. 510.

The indictment against defendant contained six counts. On demurrer, the second, third, and fourth counts were held insufficient and were quashed; and it is the judgment of the court quashing those three counts that is before this court for review.

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The second count charges that during all the year 1908 defendant was, and has ever since been, clerk of the District Court of the United States for the District of Massachusetts; that on February 1, 1909, he had in his possession three hundred and eighty-seven dollars of the public moneys of the United States, which during the year 1908 had come into his possession and under his control as such officer, "and were a portion of surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year 1908, which said public moneys said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, as such officer, was charged, by certain acts of Congress, to wit, sections 823, 828, and 844 of the Revised Statutes of the United States, and the act approved June 28, 1902 (32 Statutes at Large, chapter 1301), and by divers other acts of Congress safely to keep; that said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, at Boston, aforesaid, the same public moneys unlawfully did fail safely to keep as required by said acts of Congress, and on the contrary, the same then and there unlawfully did convert to his own use; and that thereby said Frank H. Mason then and there was guilty of embezzlement of said public moneys so converted."

The third count is the same as the second, except it charges that the defendant "unlawfully *and fraudulently*" converted the money to his own use,

while the first count only charges that the conversion was *unlawful*.

In the fourth count the money converted is mentioned as "a portion of the money of the United States," instead of "certain public moneys of the United States," as in the second and third counts; and after stating how the money came into defendant's hands as in those counts, it proceeds:

> which money last aforesaid he should, on said first day of February, in the year nineteen hundred and nine, have paid to the United States at Boston aforesaid in the manner provided by law; and that said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, at Boston, aforesaid, the same money unlawfully, wrongfully, and fraudulently did convert to his own personal use and embezzle. (Rec., pp. 3 and 4.)

The other three counts in the indictment are similar to these, except they do not state the nature of the funds embezzled, and they were therefore held sufficient on demurrer.

A number of grounds are set out in the demurrer, but the following language of the court expresses the conclusion reached after a consideration of the questions at some length:

> Under sections 833 and 844, which provided not only for the semiannual returns, but also that when the returns are made, and not sooner, the clerk shall pay into the Treasury of the United States the amounts shown by them to be due from him, it is my opinion that the clerk

> can not be charged in any way criminally for any disposition of any part of the fees and emoluments received by him as fees and emoluments under any general provisions of the statutes of the United States with reference to embezzlement. (Rec., p. 16.)

This conclusion appears to rest on the idea that the money collected by the clerk as fees and emoluments, belongs to him and not to the Government, and that the general statutes relating to embezzlement were not intended to apply to such case, and that the act of February 29, 1875, chapter 95 (18 Stat., 333), which will be hereinafter quoted, affords the only method of procedure against the clerk for such malfeasance in office.

Nos. 511 and 512.

These cases involve precisely the same principles as No. 510, the only difference in the facts being that in No. 511 defendant was indicted for converting three hundred and fifty-seven dollars and fifty cents on February 1, 1908, the surplus of the fees and emoluments of his office for the year 1907; and in No. 512 he was indicted for converting three hundred and fifty dollars on February 1, 1907, the surplus of the fees and emoluments of his office for the year 1906; while in No. 510 he was indicted for embezzling the surplus fees and emoluments for the year 1908.

STATUTES MATERIAL TO THE INQUIRY.

The statutes which are mentioned in the assignments of errors as affording a basis for these counts of the indictment, are the following:

Section 5490, Revised Statutes:

> Every officer or other person charged by any act of Congress with the safe-keeping of the public moneys, who fails to safely keep the same, without loaning, using, converting to his own use, depositing in banks, or exchanging for other funds than as specially allowed by law, shall be guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged; and shall be imprisoned not less than six months nor more than ten years, and fined in a sum equal to the amount of money so embezzled.

Section 5497, Revised Statutes:

> Every banker, broker, or other person not an authorized depositary of public moneys * * * who uses, transfers, converts, appropriates or applies any portion of the public money for any purpose not prescribed by law * * * is guilty of an act of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be punished as prescribed in section fifty-four hundred and eighty-eight;

and amendment of February 3, 1879, ch. 42 (20 Stat. 280):

> And any officer of the United States, or any assistant of such officer, who shall embezzle

> or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or assistant, whether the same shall be the money or property of the United States or of some other person or party, shall, where the offense is not otherwise punishable by some statute of the United States, be punished by a fine equal to the value of the money and property thus embezzled or converted, or by imprisonment not less than three months nor more than ten years, or by both such fine and imprisonment.

Act of March 3, 1875, chapter 144, section 1 (18 Stat., 479):

> That any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be deemed guilty of felony, and on conviction thereof before the district or circuit court of the United States in the district wherein said offense may have been committed, or into which he shall carry or have in possession said property so embezzled, stolen, or purloined, shall be punished therefor by imprisonment at hard labor in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or both, at the discretion of the court before which he shall be convicted.

The United States also contends that the facts alleged in the indictment fall within the provisions of section 5489, Revised Statutes, as enlarged by section 5493, which two sections read as follows:

> SEC. 5489. If the Treasurer of the United States, or any assistant treasurer, or any public depositary, fails safely to keep all moneys deposited by any disbursing officer or disbursing agent, as well as all moneys deposited by any receiver, collector or other person having moneys of the United States, he shall be deemed guilty of embezzlement of the moneys not so safely kept, and shall be imprisoned not less than six months nor more than ten years, and fined in a sum equal to the amount of money so embezzled.
>
> SEC. 5493. The provisions of the five preceding sections shall be construed to apply to all persons charged with the safe-keeping, transfer, or disbursement of the public money, whether such persons be indicted as receivers or depositaries of the same.

The only statute which the court below thought applicable to the conduct of clerks with reference to revenue collected by them, is the act of February 22, 1875, chapter 95, section 6 (18 Stat., 334). Section 5 of this act provides that if any clerk shall willfully refuse or neglect to make or forward any report, certificate, statement, or other document required by law to be made or forwarded by him, it shall be the duty of the President to remove him from office, and he shall not be eligible to an appointment as clerk or

deputy clerk for two years thereafter; and section 6 reads as follows:

> That if any clerk mentioned in the preceding section shall wilfully refuse or neglect to make or to forward any such report, certificate, statement, or document therein mentioned, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, in the discretion of the court; but a conviction under this section shall not be necessary as a condition precedent to the removal from office provided for in this act.

The following are the provisions that relate to clerks' fees, and the duties of clerks with reference thereto:

Section 823, Revised Statutes:

> The following and no other compensation shall be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several States and Territories, except in cases otherwise expressly provided by law. * * *

Section 828 contains in detail a statement of the fees chargeable.

Section 833:

> Every district attorney, clerk of a district court, clerk of a circuit court, and marshal, shall, on the first days of January and July, in

each year, or within thirty days thereafter, make to the Attorney-General, in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year.

Section 839:

No clerk of a district court or clerk of a circuit court shall be allowed by the Attorney-General, except as provided in the next section and in section eight hundred and forty-two, to retain of the fees and emoluments of his office or, in case both of the said clerkships are held by the same person, of the fees and emoluments of the said offices, respectively, for his personal compensation, over and above his necessary office expenses, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury, a sum exceeding three thousand five hundred dollars a year for any such district clerk or for any such circuit clerk, or exceeding that rate for any time less than a year.

Sections 840 and 842, referred to in the foregoing section, relate to the districts of Oregon and Nevada, and prize causes.

Section 844:

Every district attorney, clerk and marshal, shall, at the time of making his half-yearly return to the Attorney-General, pay into the

Treasury, or deposit to the credit of the treasurer, as he may be directed by the Attorney-General, any surplus of the fees and emoluments of his office, which said return shows to exist over and above the compensation and allowances authorized by law to be retained by him.

Section 845:

In every case where the return of a district attorney, clerk, or marshal shows that a surplus may exist, the Attorney-General shall cause such returns to be carefully examined, and the accounts of disbursement to be regularly audited by the proper officer of his Department, and an account to be opened with such officer in proper books to be provided for that purpose.

Section 846:

The accounts of district attorneys, clerks, marshals, and commissioners of circuit courts shall be examined and certified by the district judge of the district for which they are appointed, before they are presented to the accounting officers of the Treasury Department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts: *Provided*, That no accounts of fees or costs paid to any witness or juror, upon the order of any judge or commissioner, shall be so reexamined as to charge any marshal for an erroneous taxation of such fees or costs.

In the appropriation act for sundry civil expenses of June 28, 1902, chapter 1301 (32 Stat., 475, 476), in connection with the appropriation for clerks appears the following proviso:

> *Provided*, That each clerk of the district and circuit courts shall, on the 1st days of January and July of each year, or within thirty days thereafter, make to the Attorney-General, in such form as he may prescribe, written returns for the half year ending on said days, respectively, of all fees and emoluments of his office of every name and character, and of all necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year; and the word "emoluments" shall be understood as including all amounts received in connection with the admission of attorneys to practice in the court, all amounts received for services in naturalization proceedings, whether rendered as clerk, as commissioner, or in any other capacity, and all other amounts received for services in any way connected with the clerk's office.

This proviso is the same in substance with reference to the reports required as section 833, Revised Statutes, except it defines the word "emoluments" as embracing items which had theretofore been omitted by clerks.

The court below held that the case turned largely on the ownership of the funds collected, and in what capacity the clerk held them. And the views upon this subject heretofore expressed by this and other United States courts are important, although they have, to a very great extent, been *dicta*.

In *Bean* v. *Patterson*, 110 U. S., 401, 403, appellants had delivered to the clerk of the Supreme Court the requisite number of printed copies of the record, and asked that the cause be docketed without securing the payment of the fee chargeable under the rules of the court. The court allowed the case to be docketed, but held that the printed copies could not be delivered to the court for use without the payment of the fee on demand of the clerk in time to enable him to perform his duties in connection with the copies.

By the act of March 3, 1883, chapter 143 (22 Stat., 631), the Supreme Court clerk, with reference to compensation, had been placed on precisely the same footing as the clerks of other courts, and in considering the necessity of the payment of the fee, the court said:

> As the law now stands *the fees and emoluments of the office belong to the Government*, subject only to the payment of the annual salary of the clerk, necessary clerk hire, and incidental expenses, and *the clerk is the collecting agent for the Government*.

United States v. *Hill*, 123 U. S., 681, 686, was an action brought by the Government against Hill on

his bond for "not properly accounting for all moneys coming into his hands, as required by law, according to the condition of said bond." The case was decided in the court below against the Government; and it was sought to bring it to this court for review, one ground of jurisdiction insisted upon being that it was an action brought for the enforcement of a "revenue law," and, therefore, jurisdiction did not depend upon the amount involved. The court held that the statute in question—

> clearly implies that the term "revenue law," when used in connection with the jurisdiction of the courts of the United States, means a law imposing duties on imports or tonnage, or a law providing in terms for revenue; that is to say, a law which is directly traceable to the power granted to Congress by section 8, Article I, of the Constitution, "to lay and collect taxes, duties, imposts, and excises,"

and that the action was not, therefore, brought to enforce a revenue law. In deciding this point the court remarked:

> The clerk of a court of the United States collects his taxable "compensation," not as the revenue of the United States, but as the fees and emoluments of his office, with an obligation on his part to account to the United States for all he gets over a certain sum which is fixed by law. This obligation does not grow out of any "revenue law," properly so called, but out of a statute governing an officer of a court of the United States.

There is some apparent inconsistency in the two expressions, but in neither case was it material whether the funds when collected belonged to the Government and were held by the clerk as the Government's agent, or whether they belonged to the clerk with an obligation that he would pay the excess over to the Government. That they were mere incidental expressions is evident, because both opinions were delivered by Chief Justice Waite.

United States v. *Smith*, 158 U. S., 346, 355, was an appeal from the Court of Claims, and involved an accounting between the Government and a district attorney. Among other matters, the district attorney claimed that he was entitled to retain fees paid him in certain land suits, which he insisted it was not part of his official duty to look after. The court held that whether he was required to perform the services or not—

> the compensation was received by him as district attorney, and he is bound to account for it to the Government as a part of the emoluments of his office, since by the act of August 7, 1882 (22 Stat., 344), "All fees *or moneys* received by him above said amount" (of $3,500 per year) "shall be paid into the Treasury of the United States."

Bliss v. *United States*, 37 Fed., 191, 196, was also a suit between a district attorney and the United States; and one question was whether the district attorney could retain a larger fee than the law allowed because it had been taxed in his favor and had al-

ready been paid to him. Judge Thayer in considering the question said:

> According to my view of the law, however, the Commissioner of Internal Revenue could not, by consenting to the taxation of a greater fee in favor of the district attorney than the law allowed him, thereby preclude the Government from asserting its right to so much of the fee as was excessive. I conclude that, *as soon as the fee was paid to the district attorney by the defendant in the revenue suits, so much of it as was in excess of what the law allowed for his services, inured to the benefit of the United States. The Government was forthwith at liberty to treat what was so paid to its attorney in excess of his lawful fee as money in his hands belonging to the Government.*

In re United States v. *Cigars*, 2 Fed., 494, 496, the question was whether fees of officers accruing in revenue cases should be retained by the officers and accounted for in their semi-annual report, or should be paid over to the internal-revenue department through the collector and the officers look to the Treasury for its return. Both District Judge Butler and Circuit Judge McKennan concurred in the view that such fees should be retained by the officers, and Judge Butler incidentally remarked:

> The fees belong to the officers as the emoluments of their offices.

But, in *United States* v. *Wolters*, 51 Fed., 896, 899, Judge Ross took an opposite view, saying:

> Nor do the fees or commissions of the officers belong to them without qualification. To the

> limit of the maximum of their compensation they do, *but when that limit is exceeded, both fees and commissions belong to the Government.*

United States v. *Mason*, 129 Fed., 742, involved the question whether the clerk should be allowed as expenses a certain sum which had been paid for some blank forms to be used by referees in bankruptcy. In discussing the question, the Circuit Court of Appeals, First Circuit, said:

> *The moneys in the hands of the clerk are the property of the Government*, subject only to the payment of his compensation and his necessary office expenses, including necessary clerk hire. *The clerk is the collecting agent for the Government.* (*Bean* v. *Patterson*, 110 U. S., 401, 4 Sup. Ct. 23, 28 L. Ed., 190.) His duties as collecting agent are prescribed by statutes governing an officer of a court of the United States.

It thus appears that there have been expressions of this and other courts favoring both contentions—that the fees and emoluments collected belong to the Government, the officer collecting the same as an agent, and having the right to deduct therefrom the amount fixed by law as compensation for his services, and also that such fees and emoluments belong to the officer, with the obligation that he pay over to the Government all collected in excess of the amount of his salary; but the weight of these expressions is clearly with the former view.

ARGUMENT.

1. *All fees and emoluments, when collected, are the property of the Government.*

This necessarily results from the language of the statutes above quoted. The ownership of the fees of the clerk's office, under the law as it formerly existed, is entitled to but little or no consideration in determining their ownership under the present law. The act of February 26, 1853, chapter 80 (10 Stat., 161), the provisions of which are carried into the Revised Statutes in Title XIII, chapter 16, placed the fees and emoluments of the officers therein mentioned upon an entirely new footing; and their ownership must be determined from the construction of these statutes alone.

It is true that in section 823 the fees are spoken of as "compensation * * * taxed and allowed * * * to district attorneys, clerks," etc.; but it is allowed to them not as individuals, but in their official capacity, that is, to their *offices*. This is clearly shown by section 833, wherein every clerk, district attorney, and marshal is required to make a return on the first days of January and July, of "all the fees and emoluments *of his office;*" and again, by section 839, in which it is provided that no clerk shall be allowed "to *retain* of the fees and emoluments *of his office*" an amount in excess of a certain sum and expenses. The word "retain," as here used, certainly implies a mere *right of possession* in the clerk, and not ownership.

Therefore, under these statutes, the fees and emoluments are attached to the *office*, and are held by the clerk in his official capacity, with the right to *retain* for or pay over to himself individually a certain amount out of these moneys, and the duty to remit the remainder to the Government Treasury. These moneys, therefore, are *public funds*, and the clerk holds them as a mere agent, charged, first, with the duty of compensating himself out of the same *as a public official*, and then of depositing the remainder with the other public moneys.

2. *Certainly, after the clerk has received the full amount of his compensation, and the time for making his return and covering the balance into the United States Treasury has expired, such balance belongs to the United States.*

No language could more plainly imply that such surplus revenue belongs to the United States, and that the clerk's duty to pay it over is not a mere *indebtedness* to the Government.

The word "retain" in section 839 not only implies a mere right of possession in the clerk, as above suggested, but it with absolute certainty implies that the money to be paid into the Treasury or deposited to its credit is *the same money* which is received by the clerk as a part of the fees and emoluments of his office. But if this word could be so construed as to leave any doubt upon this question section 844 would set such doubt at rest. It is there provided that the clerk shall pay into the Treasury

or deposit to the credit of the Treasurer "*any surplus of the fees and emoluments of his office* which said return shows to exist over and above the compensation and allowances authorized by law to be *retained* by him." That is, he may retain moneys so received up to a certain sum, but any surplus *of the fees and emoluments* he must turn over to the United States.

How, then, can it be contended with any show of reason that he has any right whatever to this surplus, or has any kind of ownership thereof, except that of a holder as an official or agent of the United States? Of course, as a matter of practice, the same dollars are not transmitted to the Treasury that are received by the clerk; but it should all be deposited with his official account, and he may, from time to time, as these fees and emoluments are collected, pass them to his private account until he has received all that he has the right to retain; but the balance belongs to the United States, and when he invades that balance he appropriates the money of the United States.

The three counts in this indictment which were quashed by the court below show that the defendant had on hand a month after the last report for the year 1908 should have been made three hundred and eighty-seven dollars "of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him" for that year, and that he then converted it to his own use and embezzled it.

What claim, either equitable or technically legal, had he at that time to that money? He had already taken every dollar which the law allowed him to *retain* for compensation; and here were three hundred and eighty seven dollars which the law expressly required him a month before to pay over to the United States. Let it be specially emphasized that the statute did not create a mere legal liability or indebtedness of three hundred and eighty-seven dollars; but that it required that *this identical money should be paid into the Treasury or deposited to the credit of the Treasurer.*

3. *The statutes defining embezzlement apply to the conversion of the funds by defendant as alleged in the second, third, and fourth counts of the indictment.*

Section 5490 of the Revised Statutes applies to *every officer or other person* charged by any act of Congress with the safe-keeping of the public money, and specifies what disposition of such moneys shall be embezzlement, one form being the conversion of it to the holder's own use. As above shown, the three hundred and eighty-seven dollars mentioned in the indictment was *public money.* It should be noted that the statute does not mention in whom the technical ownership of the money shall be, but only requires that it be "public money." This public money was held by defendant as an "officer or other person," and he converted it to his own use, and no other element is required to make the offense complete.

By section 5489, as modified by section 5493, any person who is charged with the *safe-keeping, transfer,*

or disbursement of public money is guilty of embezzlement *if he fails to safely keep it.* Under these sections the embezzlement consists in defendant's failure to safely keep the money. It is not necessary to discuss whether or not an innocent loss of public money, as by robbery or accident free from negligence, would render the holder liable, because the three counts of the indictment which were quashed allege that defendant converted it to his own use, which shows that the loss was not accidental or free from fault.

Section 5497 applies to every person not an authorized depositary of public money, and makes it an embezzlement for such person to convert or appropriate or apply any portion of the public money; and, as amended by the act of February 3, 1879, applies to all officers of the United States and assistants of such officers, who embezzle any money which has come into their control by virtue of their office, whether money of the United States or of some other person.

Section 1, ch. 144, act of March 3, 1875 (18 Stat., 479), applies to "*any person* who shall embezzle, steal, etc., any money or other property of the United States."

Consequently, under this statute, it is immaterial in what capacity the person is holding the property embezzled.

It is impossible to see how defendant can escape all of these statutes.

4. *Sections 5 and 6 of the act of February 22, 1875, chapter 95 (18 Stat., 334), do not provide the only punishment that can be imposed upon clerks for misconduct in connection with fees and emoluments of their offices, as held by the court below.*

As heretofore shown, these sections refer solely to reports, certificates, statements, and documents which the law requires clerks to make; and a failure to make such report, certificate, statement, or document subjects them to removal from office, and to conviction for a misdemeanor, with a minimum punishment of a fine of one thousand dollars or imprisonment for one year, within the discretion of the court.

The following considerations show the absurdity of such a contention:

First. That Congress would deem it of more vital importance and a greater mark of moral turpitude that the clerk should fail to make *the report* of the surplus fees and emoluments collected by him than to withhold them and convert them to his own use.

The report and the remittance of the money are separate and distinct transactions, although they are both required to be made at the same time. The report goes to the Attorney-General, while the remittance goes to the Treasury, unless the Attorney-General previously directs that it be elsewhere deposited to the credit of the Treasurer. Is there any reason why liability for misconduct in connection with one of these transactions should exonerate the officer from liability for misconduct in connection with the other, or can it be conceived that because

the clerk may be discharged from office and prosecuted for a misdemeanor for failure to make a report he should be permitted to file his report, and then convert the money reported with impunity?

Since such a contention is not reasonable, the statute will not be so construed, unless such intention clearly appears therefrom. But there is nothing in the statute from which such an intention can be inferred. The conclusion reached by the court below rests entirely on the fact that this act relates to the regulation of fees and costs, and provides for a punishment in case the clerk fails to make a report; and nothing is said therein about a conversion of the surplus funds. Clearly, however, punishment was not provided in this act for the misconduct of real importance—the conversion of the money—because the clerk was already liable to punishment for such an offense. And such omission, instead of being evidence of an intent that a clerk should not be liable to punishment for appropriating the surplus fees and emoluments of his office, shows that criminal liability for such misconduct already existed when the act was passed.

Second. The punishment for the offense, if said sections 5 and 6 provide the only punishment to which a clerk may be subjected for improper conduct in connection with the fees and emoluments of his office, is totally inadequate.

A clerk might convert five thousand dollars and cover up the conversion by omitting such sum from his report, yet he could be punished only by a fine

of one thousand dollars or imprisonment for one year.

Third. If the court below be correct in his view, no punishment whatever was provided for marshals and district attorneys, and they might have refused to make any report whatever of the surplus received by them and have misappropriated all of such funds with absolute impunity, provided they were insolvent. Of course the Government could have recovered on their bonds, but their sureties would have been without redress.

Nor is there anything within the statutes heretofore quoted defining embezzlement to indicate that they were intended to apply only to officials connected with the Treasury Department, as intimated by the court below; but the contrary intent is conclusively shown by their express language. In fact, Congress appears to have done its utmost to clearly express its intention that no one, regardless of who he might be, or in what capacity acting, could convert public money to his own use, or willfully or negligently lose the same, if in his care, and escape punishment therefor.

The judgment of the court below should therefore be reversed and the case remanded for trial.

J. A. FOWLER,
Assistant Attorney-General.

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Supreme Court of the United States.

October Term, 1910.

Nos. 510, 511, 512.

UNITED STATES, Plaintiff in Error,

v.

FRANK H. MASON.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Defendant's Brief.

STATEMENT OF THE CASE.

These cases come before this Court on writs of error to the Circuit Court of the United States for the District of Massachusetts to review judgments of that Court sustaining demurrers to the second, third, and fourth counts of three indictments, each count chargeng the defendant with embezzlement of moneys of the United States which were a portion of a surplus of the fees and emoluments of his office as clerk of the District Court of the United States in excess of the compensation and allowances which he was authorized to retain. The Court sustained the demurrer to those counts on the ground that moneys received as fees and emoluments of the clerk's office were not the subject of embezzlement. The indictments are identical with the

exception of dates and amounts of the alleged embezzlements.

The indictment, demurrer, ruling of the Circuit Court, and judgment in each case appear, respectively, at pages 2, 6, 16, and 12 of the record.

The question presented by this ruling is raised by the fifth and sixth assignments of error at page 20 of the record.

ARGUMENT.

The second and third counts of the indictments are under section 5490 of the Revised Statutes of the United States. This section is as follows: —

> "Every officer or other person charged by any act of Congress with the safe-keeping of the public moneys, who fails to safely keep the same, without loaning, using, converting to his own use, depositing in banks, or exchanging for other funds than as specially allowed by law, shall be guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged; and shall be imprisoned not less than six months nor more than ten years, and fined in a sum equal to the amount of money so embezzled."

The fourth count is under the act of March 3, 1875, c. 144, sec. 1, 18 Stat. 479, which is as follows: —

> "Sec. 1. Be it enacted, &c., That any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or

property of the United States, shall be deemed guilty of felony, and on conviction thereof before the district or circuit court of the United States in the district wherein said offense may have been committed, or into which he shall carry or have in possession of said property so embezzled, stolen, or purloined, shall be punished therefor by imprisonment at hard labor in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or both, at the discretion of the court before which he shall be convicted."

Conversion of funds of the United States is not an embezzlement under section 5490 if not fraudulently made.

Dimmick v. *United States*, 121 Fed. Rep. 638 (C.C.A.).
United States v. *Carll*, 105 U.S. 611.

It follows that embezzlements under section 5490, as well as those under the act of 1875, embrace all the elements of embezzlement as generally defined by statutes, and are subject to the general rules of criminal jurisprudence governing the crime of embezzlement.

There can be no embezzlement of moneys of the United States described in the counts in question, unless the title to the specific bills or coins converted was in the United States, and the title to those pieces of money was not in the United States within the rules of criminal jurisprudence, unless the United States had the right to receive and the defendant was bound to pay over the identical bills or coins which he received as

fees and emoluments and afterwards converted. In other words, if the defendant had a right to mingle the pieces of money converted with his own funds and if his full obligation to the United States would have been discharged by paying from any funds at the proper time the surplus of fees and emoluments over and above his lawful compensation and allowances, then the moneys received as fees and emoluments of his office were not the property of the United States and he cannot be guilty of embezzling the same; but his obligation is of a contractual nature to pay over to the United States the balance found due on accounting.

The right of a person to mingle with his own funds those received on another's account is conclusive that the funds thus received are not the property of the latter.

Commonwealth v. *King*, 202 Mass. 379, pp. 391, 392.
Commonwealth v. *Stearns*, 2 Met. 343.
Commonwealth v. *Libby*, 11 Met. 64.

The right of the clerk to mingle with other funds those received as fees and emoluments is apparent from the history of legislation on that subject.

Formerly the clerks' fees and emoluments belonged to them without any accountability therefor.

The act of May 8, 1792, c. 36, sec. 3, 1 Stat. 276, 277, added to the compensation of clerks such fees as were allowed in the Supreme Court of the state; and for discharging duties not performed by the clerks of state courts, and for which the laws of the state made no allowance, such reasonable compensation as the Court might allow. The clerks, under the statutes

then in force, retained all the fees for their compensation and were not obliged to make any return.

Subsequent legislation imposed upon them the obligation to account and pay over to the United States the surplus of their fees over and above a fixed compensation and office expenses.

The act of March 3, 1841, c. 35, 5 Stat. 427, 428, fixed the compensation of clerks at $4500 a year over and above expenses payable from fees only, and required them to pay the surplus into the treasury under such rules as the Secretary of the Treasury might establish.

The act of May 18, 1842, c. 29, 5 Stat. 483, required the clerks to make semiannual returns and authorized them to retain from the fees $3500 in excess of office expenses, etc., as compensation, and required them to pay the surplus into the treasury.

The act of February 26, 1853, c. 80, sec. 3, 10 Stat. 161, was the first uniform statute regulating the fees of court officers throughout the United States. It established the present fee bill and is the immediate ancestor of most of the present statutory provisions regulating the fees and emoluments of clerks. We recite or refer to some of them:

> Sec. 823. "The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several States and Territories, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients,

other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon by the parties."

Sec. 839. "No clerk of a district court, or clerk of a circuit court, shall be allowed by the Attorney General, except as provided in the next section, and in section eight hundred and forty-two to retain of the fees and emoluments of his office, or, in case both of the said clerkships are held by the same person, of the fees and emoluments of the said offices, respectively, for his personal compensation, over and above his necessary office expenses, including necessary clerk-hire, to be audited and allowed by the proper accounting officers of the Treasury, a sum exceeding three thousand five hundred dollars a year for any such district clerk or for any such circuit clerk, or exceeding that rate for any time less than a year."

Sec. 843. "The allowances for personal compensation of district attorneys, clerks, and marshals, for each calendar year, shall be made from the fees and emoluments of that year, and not otherwise."

Section 828 enumerates the clerk's fees.

The act of June 28, 1902, c. 1301, sec. 1, 32 Stat. 475, 476, contains the provision:

"That each clerk of the district and circuit courts shall on the first days of January and July of each year, or within thirty days thereafter, make to the Attorney-General, in such form as he may prescribe, written returns for the half year ending

on said days, respectively, of all fees and emoluments of his office of every name and character, and of all necessary expenses of his office, including necessary clerk-hire, together with the vouchers for the payment of the same for such last half year; and the word 'emoluments' shall be understood as including all amounts received in connection with the admission of attorneys to practice in the court, all amounts received for services in naturalization proceedings, whether rendered as clerk, as commissioner, or in any other capacity, and all other amounts, received for services in any way connected with the clerk's office: Provided further, That no amount in excess of one dollar shall be received from any attorney in connection with his admission to practice in a circuit or district court."

Sec. 844. "Every district attorney, clerk, and marshal shall, at the time of making his half-yearly return to the Attorney-General, pay into the Treasury, or deposit to the credit of the Treasurer, as he may be directed by the Attorney-General, any surplus of the fees and emoluments of his office, which said return shows to exist over and above the compensation and allowances authorized by law to be retained by him."

Sec. 845. "In every case where the return of a district attorney, clerk, or marshal shows that a surplus may exist, the Attorney-General shall cause such returns to be carefully examined, and the accounts of disbursements to be regularly audited by the proper officer of his Department, and an account to be opened with such officer in proper books to be provided for that purpose."

Sec. 795. "The clerk of every court shall give bond, in a sum to be fixed and with sureties to be approved by the court which appoints him, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court of which he is clerk; and a new bond may be required whenever the court deems it proper that such bond should be given. A copy of every bond given by a clerk shall be entered on the journal of the court for which he is appointed, and the bond shall be deposited for safe-keeping as the court may direct. A certified copy of such entry shall be *prima-facie* proof of the execution of such bond and of the contents thereof."

The history of the earlier of these enactments may be found in *United States* v. *Hill*, 120 U.S. 169.

Ever since the accountability of the clerks for fees and emoluments in excess of compensation and expenses was created, it has been their usage to mingle them with other funds and to pay the balance due on accounting from personal funds from whatever source.

This usage is of importance on the interpretation of the statutes.

United States v. *Hill*, 120 U.S. 169.

It will be seen that this usage is entirely consistent with the statutes to which we will now refer.

An account is opened with the clerk by the attorney general only when the clerk's return shows a probable surplus. If no surplus is shown apparently no account is opened.

Rev. Sts. sec. 845.

So much of the fees as are required to pay the clerk's salary and expenses belong absolutely to him.

Rev. Sts. secs. 823, 839.

The clerk is charged in that account with even the fees which he has not collected.

Steever v. *Rickman*, 109 U.S. 74.

Suits to collect them must be brought in his name.

See Rev. Sts. sec. 857.

He is obliged on the first days of January and July to make half-yearly returns of fees, emoluments, and expenses.

Act of June 28, 1902, c. 1301, sec. 1, 32 Stat. 475.

At the time of making that return he is required to pay into the treasury the surplus of the fees and emoluments "*which the return shows to exist* over and above the compensation and allowances authorized by law to be retained."

Rev. Sts. sec. 844.

For failure to make such payment of the balance *shown by his return*, or for failure to include all fees in his return, the remedy is by suit on his bond.

Rev. Sts. sec. 795.

To insure a prompt return the act of February 22, 1875, c. 95, secs. 5, 6, 18 Stat. 333, makes it a penal offense for a clerk to wilfully neglect or refuse to make any report required by law.

It is significant that the statutes do not require that the fees or emoluments shall be deposited by the clerk in any bank or depository, or that they shall be retained intact, or held subject to the order of any judge or other officer, but do require that other moneys (namely, registry funds) received by clerks shall be deposited in the name and to the credit of his Court, and shall be withdrawn only by order of his Court.

Rev. Sts. secs. 995, 996.

It is equally significant that the statutes specifically make it embezzlement for a clerk to convert such other moneys received by him, but contains no such provision with respect to fees and emoluments.

Rev. Sts. secs. 5504, 5505.

So too the statutes in terms provide for the payment of taxes, costs, penalties, and forfeitures to the treasury.

Rev. Sts. secs. 3216, 4050.

The statutes throughout recognize a distinction between fees and emoluments of a clerk and public moneys received by him and other officers, providing in the former case for the payment by the clerk of the surplus due upon an accounting and in the latter case for the payment to the government of the identical funds received.

This distinction is accentuated by contrasting with Rev. Sts. secs. 839, 844, as printed on pages 6, 7 of this brief, the provisions of section 3617, as follows: —

> Sec. 3617. "The gross amount of all moneys received from whatever source for the use of the

United States, except as otherwise provided in the next section, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein contained shall affect any provision relating to the revenues of the Post Office Department."

The attorney general would not have authority under Rev. Sts. sec. 368, to require the clerks to pay over the identical moneys received for fees, and such a regulation, if valid, would not support an indictment.

United States v. *Maid*, 116 Fed. Rep. 650.
United States v. *Eaton*, 144 U.S. 677.
Williamson v. *United States*, 207 U.S. 425, 462.

Section 5490 is a re-enactment of provisions contained in sections 6 and 16 of the Subtreasury Act of August 6, 1846, c. 90, 9 Stat. pp. 59, 63. Neither that section nor the act of March 3, 1875, was intended to change the accountability of a clerk for fees and emoluments from a contractual to a criminal one.

In *United States* v. *Hill*, 123 U.S. 681, the Court, at page 683, in deciding that section 844 is not a revenue law, accurately describes the clerk's liability as an obligation to account:

"A clerk of a Court of the United States collects his taxable compensation, not as a *revenue* of the United States, but as the fees and emoluments of

his office, with an obligation on his part to *account* to the United States for all he gets over a certain sum which is fixed by law. This obligation does not grow out of any revenue law properly so-called, but out of the statute governing an officer of the Court of the United States."

Cases like *United States* v. *Mason*, 129 Fed. Rep. 742 (C.C.A.), in which the Court, in deciding that the printing of certain bankruptcy forms was an expense which could be paid out of the fees of his office, said that the moneys in his hands were the property of the United States, have little bearing on the question here presented.

If a suit to recover clerk's fees must be brought in the name of the clerk it follows that the legal title to the fees is in the clerk and not in the United States.

It is of some significance that the statutes impose no penalty for the wilful failure of a clerk to collect all fees, because such omission indicates that the liability of the clerk upon his bond sufficiently guards the interests of the government.

BOYD B. JONES,
GEORGE L. WILSON,
Attorneys for Defendant.

[redacted]

Supreme Court of the United States.

October Term, 1910.

Nos. 510, 511, 512.

UNITED STATES, Plaintiff in Error,

v.

FRANK H. MASON.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Defendant's Supplemental Brief.

STATEMENT OF THE CASE.

These cases come before this Court on writs of error to the Circuit Court of the United States for the District of Massachusetts to review judgments of that Court sustaining demurrers to the second, third, and fourth counts of three indictments, each count charging the defendant with embezzlement of moneys of the United States which were a portion of a surplus of the fees and emoluments of his office as clerk of the District Court of the United States in excess of the compensation and allowances which he was authorized to retain. The Court sustained the demurrer to those counts on the ground that moneys received as fees and emoluments of the clerk's office were not the subject of embezzlement under the federal statutes. The indict-

ments are identical with the exception of dates and amounts of the alleged embezzlements.

The indictment, demurrer, ruling of the Circuit Court, and judgment in each case appear, respectively, at pages 2, 6, 16, and 12 of the record.

The question presented by this ruling is raised by the fifth and sixth assignments of error at page 20 of the record.

ARGUMENT.

The second and third counts of the indictments are under section 5490 of the Revised Statutes of the United States. This section is as follows: —

> "Every officer or other person charged by any act of Congress with the safe-keeping of the public moneys, who fails to safely keep the same, without loaning, using, converting to his own use, depositing in banks, or exchanging for other funds than as specially allowed by law, shall be guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged; and shall be imprisoned not less than six months nor more than ten years, and fined in a sum equal to the amount of money so embezzled."

Apparently the fourth count is under the act of March 3, 1875, c. 144, sec. 1, 18 Stat. 479, which is as follows: —

> "Sec. 1. Be it enacted, &c., That any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be deemed

guilty of felony, and on conviction thereof before the district or circuit court of the United States in the district wherein said offense may have been committed, or into which he shall carry or have in possession of said property so embezzled, stolen, or purloined, shall be punished therefor by imprisonment at hard labor in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or both, at the discretion of the court before which he shall be convicted."

See Fourth Assignment of Error, at page 20 of the record.

Conversion of funds of the United States is not an embezzlement under section 5490, or similar statutes, if not fraudulently made.

Dimmick v. *United States*, 121 Fed. Rep. 638 (C.C.A.).
United States v. *Carll*, 105 U.S. 611.

The elements of embezzlement as generally defined are reproduced in the different statutes to which the United States now refer these counts, and it follows that in dealing with them the general rules of criminal jurisprudence governing that offence are in point.

Each of the counts charges that the embezzlement was of the moneys of the United States, and more particularly describes those moneys as a portion of a surplus of the fees and emoluments of the clerk over and above the compensation and allowances authorized by law. Under the rules of criminal pleading, as well as under the statutes relied on by the United States (with

one exception), the counts are bad, if the moneys thus particularly described were not the property of the United States.

The act of February 3, 1879, c. 4, 20 Stat. 480, is the exception above noted, and reads as follows: —

> "And any officer of the United States, or any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or assistant, whether the same shall be the money or property of the United States or of some other person or party, shall, where the offense is not otherwise punishable by some statute of the United States, be punished by a fine equal to the value of the money and property thus embezzled or converted, or by imprisonment not less than three months nor more than ten years, or by both such fine and imprisonment."

If the counts be referred to this act, they are bad if the particular description of the moneys charged shows as matter of law, either that they were the property of the defendant or were not, as charged, the property of the United States.

There can be no embezzlement of moneys of the United States described in the counts in question, unless the title to the specific bills or coins converted was in the United States, and the title to those pieces of money was not in the United States, within the rules of criminal jurisprudence, unless the United States had the right to receive and the defendant was bound to pay

over the identical bills or coins which he received as fees and emoluments and afterwards converted. In other words, if the defendant had a right to mingle the pieces of money converted with his own funds and if his full obligation to the United States would have been discharged by paying from any funds at the proper time the surplus of fees and emoluments over and above his lawful compensation and allowances, then the moneys received as fees and emoluments of his office were his and not the property of the United States and he cannot be guilty of embezzling the same; but his obligation is of a contractual nature to pay over to the United States the balance found due on accounting.

The right of a person to mingle with his own funds those received on another's account is conclusive that the funds thus received are not the property of the latter.

Commonwealth v. *King*, 202 Mass. 379, pp. 391, 392.
Commonwealth v. *Stearns*, 2 Met. 343.
Commonwealth v. *Libby*, 11 Met. 64.

Embezzlement is predicated of things and not of debts. Where one has a right to mingle with his own funds those received of another it follows that the result is an obligation to pay a debt, not to return the identical pieces of money received, and that the title to the money never vested in the other party. A failure to pay the amount due on an accounting does not make the debtor an embezzler.

Ever since the accountability of clerks for fees and emoluments in excess of compensation and expenses was created, it has been their usage, with the acquies-

cence of the United States, to use the moneys received for the same as their own and to pay the balance due on accounting from personal funds from whatever sources derived.

> Opinion of the Court, at pages 14, 15, of the record.

This usage is of importance in the interpretation of the statutes.

> *United States* v. *Hill*, 120 U.S. 169.

And it will be seen that this usage is entirely consistent with the statutes and with the instructions of the department of justice to which we now refer.

Formerly the clerks' fees and emoluments belonged to them without any accountability therefor.

The act of May 8, 1792, c. 36, sec. 3, 1 Stat. 276, 277, added to the compensation of clerks such fees as were allowed in the Supreme Court of the state; and for discharging duties not performed by the clerks of state courts, and for which the laws of the state made no allowance, such reasonable compensation as the Court might allow. The clerks, under the statutes then in force, retained all the fees for their compensation and were not obliged to make any return.

By section 6 of that act suits to recover fees could be brought only in the name of the clerks, and that section is reproduced in section 857 of the Revised Statutes, which is as follows: —

> "Sec. 857: The fees and compensations of the officers and persons hereinbefore mentioned, except those which are directed to be paid out of the Treas-

> ury, shall be recovered in like manner as the fees of the officers of the States respectively for like services are recovered."

Subsequent legislation imposed upon them the obligation to account and pay over to the United States the surplus of their fees over and above a fixed compensation and office expenses, but did not vest a title to the moneys in the United States or take away from the clerk the right of action to recover the same.

The act of March 3, 1841, c. 35, 5 Stat. 427, 428, fixed the compensation of clerks at $4500 a year over and above expenses payable from fees only, and required them to pay the surplus into the treasury under such rules as the Secretary of the Treasury might establish.

The act of May 18, 1842, c. 29, 5 Stat. 483, required the clerks to make semiannual returns and authorized them to retain from the fees $3500 in excess of office expenses, etc., as compensation, and to pay the surplus into the treasury.

The act of February 26, 1853, c. 80, sec. 3, 10 Stat. 161, was the first uniform statute regulating the fees of court officers throughout the United States. It established the present fee bill and is the immediate ancestor of most of the present statutory provisions regulating the fees and emoluments of clerks. We recite or refer to some of them:

> Sec. 823: "The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several States

and Territories, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon by the parties."

Sec. 839: "No clerk of a district court, or clerk of a circuit court, shall be allowed by the Attorney General, except as provided in the next section, and in section eight hundred and forty-two to retain of the fees and emoluments of his office, or, in case both of the said clerkships are held by the same person, of the fees and emoluments of the said offices, respectively, for his personal compensation, over and above his necessary office expenses, including necessary clerk-hire, to be audited and allowed by the proper accounting officers of the Treasury, a sum exceeding three thousand five hundred dollars a year for any such district clerk or for any such circuit clerk, or exceeding that rate for any time less than a year."

Sec. 843: "The allowances for personal compensation of district attorneys, clerks, and marshals, for each calendar year, shall be made from the fees and emoluments of that year, and not otherwise."

Section 828 enumerates the clerk's fees.

The act of June 28, 1902, c. 1301, sec. 1, 32 Stat. 475, 476, contains the provision:

"That each clerk of the district and circuit courts

shall on the first days of January and July of each year, or within thirty days thereafter, make to the Attorney-General, in such form as he may prescribe, written returns for the half year ending on said days, respectively, of all fees and emoluments of his office of every name and character, and of all necessary expenses of his office, including necessary clerk-hire, together with the vouchers for the payment of the same for such last half year; and the word 'emoluments' shall be understood as including all amounts received in connection with the admission of attorneys to practice in the court, all amounts received for services in naturalization proceedings, whether rendered as clerk, as commissioner, or in any other capacity, and all other amounts, received for services in any way connected with the clerk's office: Provided further, That no amount in excess of one dollar shall be received from any attorney in connection with his admission to practice in a circuit or district court."

Sec. 844: "Every district attorney, clerk, and marshal shall, at the time of making his half-yearly return to the Attorney-General, pay into the Treasury, or deposit to the credit of the Treasurer, as he may be directed by the Attorney-General, any surplus of the fees and emoluments of his office, which said return shows to exist over and above the compensation and allowances authorized by law to be retained by him."

Sec. 845: "In every case where the return of a district attorney, clerk, or marshal shows that a surplus may exist, the Attorney-General shall cause such returns to be carefully examined, and the ac-

counts of disbursements to be regularly audited by the proper officer of his Department, and an account to be opened with such officer in proper books to be provided for that purpose."

Sec. 846: "The accounts of district attorneys, clerks, marshals, and commissioners of circuit courts shall be examined and certified by the district judge of the district for which they are appointed, before they are presented to the accounting officers of the Treasury Department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts: *Provided*, That no accounts of fees or costs paid to any witness or juror, upon the order of any judge or commissioner, shall be so re-examined as to charge any marshal for an erroneous taxation of such fees or costs."

The accounts referred to in this section are what are known as the clerk's quarterly accounts, for fees earned from the United States, and do not include fees or emoluments earned or received in suits to which the United States is not a party.

See Blue Book, instructions of Department of Justice to clerks and other officers, paragraphs 1328 to 1332, inclusive.

We are not aware of any bearing that this section or these accounts have upon the question under consideration.

Sec. 795: "The clerk of every court shall give bond, in a sum to be fixed and with sureties to be

approved by the court which appoints him, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court of which he is clerk; and a new bond may be required whenever the court deems it proper that such bond should be given. A copy of every bond given by a clerk shall be entered on the journal of the court for which he is appointed, and the bond shall be deposited for safe-keeping as the court may direct. A certified copy of such entry shall be *prima-facie* proof of the execution of such bond and of the contents thereof."

The history of the earlier of these enactments may be found in *United States* v. *Hill*, 120 U.S. 169.

From the above it will appear that an account is opened with the clerk by the attorney general when the clerk's return shows a probable surplus. If no surplus is shown apparently no account is opened.

Rev. Sts. sec. 845.

So much of the fees as are required to pay the clerk's salary and expenses belong absolutely to him.

Rev. Sts. secs. 823, 839.

The clerk is charged in that account with even the fees which he has not collected.

Steever v. *Rickman*, 109 U.S. 74.

And suits to collect them must be brought in his name.

Rev. Sts. sec. 857.

It is a fair inference that the title to the moneys collected follows the right of action, and this title and accountability for uncollected fees strongly favors the notion of indebtedness for a balance rather than of a delivery of identical moneys to the United States.

He is obliged on the first days of January and July to make half-yearly returns of fees, emoluments, and expenses.

Act of June 28, 1902, c. 1301, sec. 1, 32 Stat. 475.

At the time of making that return he is required to pay into the treasury the surplus of the fees and emoluments "*which the return shows to exist* over and above the compensation and allowances authorized by law to be retained."

Rev. Sts. sec. 844.

For failure to make such payment of the balance *shown by his return*, or for failure to include all fees in his return, the remedy is by suit on his bond.

Rev. Sts. sec. 795.

To insure a prompt return the act of February 22, 1875, c. 95, secs. 5, 6, 18 Stat. 333, makes it a penal offense for a clerk to wilfully neglect or refuse to make any report required by law.

These requirements for the semiannual payments of only the surplus of fees and emoluments "which the return shows" to exist, with the remedy afforded by a suit on the bond for anything not included in the return, or for failure to pay the balance, makes it clear that the moneys received by the clerk for fees and

emoluments are not moneys of the United States to be paid over in specie to it.

In strong contrast with the above are the statutory enactments governing the clerk's dealings with public moneys.

Fines and forfeitures and costs accruing to the United States for violation of the internal-revenue laws, received by the clerks, are payable by them to the collectors of internal revenue under section 3216:

> "All judgments and moneys recovered or received for taxes, costs, forfeitures, and penalties, shall be paid to Collectors as internal taxes are required to be paid."

Fines and penalties for violation of the postal laws, received by the clerks, are payable by them into the treasury under section 4050:

> "All fines and penalties imposed for any violation of the postal laws, except such part as may by law belong to the informer or party prosecuting for the same . . . shall be deposited in the treasury, under the direction of the Postmaster General, as part of the postal revenue."

Fines and penalties accruing to the United States for violation of the custom laws, received by the clerks, are payable by them into the treasury.

Rev. Sts., sec. 3090.

Moneys belonging neither to the United States nor to the clerk, paid into court, must be deposited by the clerk to the credit of the Court and drawn only on the order of the judge.

Sec. 995: "All moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court: *Provided*, That nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court."

Sec. 996: "No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk: and every such order shall state the cause in or on account of which it is drawn."

The instructions of the department of justice to the clerks require the latter to make these payments and deposits on the day received or as soon as practicable.

Paragraphs 152 to 156, inclusive.
Paragraphs 1300 to 1304, inclusive.
Paragraphs 1290 to 1295, inclusive.

And Rev. Sts. sec. 3617, requires that all such moneys be paid over without any abatement or deduction whatever:

Sec. 3617: "The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided in the next section, shall be paid by the officer or agent receiving the same into the Treasury, at as early

a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein contained shall affect any provision relating to the revenues of the Post Office Department."

Section 3618 relates to moneys received from the sale of old material, condemned stores, supplies, etc.

Unless we are mistaken in our review of the statutes and regulations, they have treated fees and emoluments of a clerk as moneys belonging to him, as distinguished from other moneys received by him which are admittedly public moneys.

Thus suits to recover the clerk's fees and emoluments must be brought in his name and cannot be maintained in the name of the United States; the clerk's accountability is for the surplus of fees and emoluments earned over and above compensation and allowances, and not for surplus of moneys in fact collected; there is no requirement that the clerk should pay over the identical moneys received for fees and emoluments, and in fact he is dependent upon them for his support, and in practice has always, with the acquiescence of the United States, treated them as his own; the payment of the surplus is made semiannually from any funds belonging to him and by express provision of the statute is directed to be made only for the amount shown by his return, leaving controverted amounts to be collected by suit upon his bond. On the other hand, in respect of public moneys, he is required to pay or deposit with the government forthwith, and daily if practicable, the identical funds collected.

The attorney general would not have authority under Rev. Sts. sec. 368, to require the clerks to pay over the identical moneys received for fees, and such a regulation, if valid, would not support an indictment.

> *United States* v. *Maid*, 116 Fed. Rep. 650.
> *United States* v. *Eaton*, 144 U.S. 677.
> *Williamson* v. *United States*, 207 U.S. 425, 462.

Section 5490 is a re-enactment of provisions contained in sections 6 and 16 of the Subtreasury Act of August 6, 1846, c. 90, 9 Stat. pp. 59, 63. Neither that section nor the other statutes referred to by the United States was intended to change the accountability of a clerk for fees and emoluments from a contractual to a criminal one.

In *United States* v. *Hill*, 123 U.S. 681, the Court, at page 683, in deciding that section 844 is not a revenue law, accurately describes the clerk's liability as an obligation to account:

> "A clerk of a Court of the United States collects his taxable compensation, not as a *revenue* of the United States, but as the fees and emoluments of his office, with an obligation on his part to *account* to the United States for all he gets over a certain sum which is fixed by law. This obligation does not grow out of any revenue law properly so-called, but out of the statute governing an officer of the Court of the United States."

Cases like *United States* v. *Mason*, 129 Fed. Rep. 742 (C.C.A.), in which the Court, in deciding that the print-

ing of certain bankruptcy forms was an expense which could be paid out of the fees of his office, said that the moneys in his hands were the property of the United States, have little bearing on the question here presented.

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